Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1927

No. 159

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,
PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR CERTIORARI TO THE COURT OF CLAIMS.

(32,383)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1927.

[fol. a]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, The Goodyear Tire & Rubber Company, Inc., respectfully represents:

The Decision Below

June 14, 1926, the Court of Claims sustained a demurrer and dismissed the petition of The Goodyear Tire & Rubber Company, Inc. A motion for new trial was filed by the petitioner July 16, 1926, and was overruled October 25, 1926. The decisions of the Court of Claims have not yet been reported.

Summary of the Matter Involved

The petitioner sues for unpaid rent under a lease to the United States for the use of the Veterans' Bureau at an annual rental of $44,152.58 involving property in Cincinnati, [fol. b] Ohio.

This lease was dated in 1921 and by its terms was to continue until June 30, 1926, provided there was sufficient appropriations from year to year. Prior to June 30, 1923, representatives of the Veterans' Bureau notified the petitioner that the United States would give up occupancy of the premises as of June 30, 1923.

Prior to June 30, 1923, an act had been passed providing a sufficient appropriation for such rent for the period from June 30, 1923, to June 30, 1924, 42 Stat. L. 1227. What followed is thus stated in the plaintiff's petition:

"When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws* of the State of Ohio by reason of holding over."

The United States continued in possession until December 20, 1923, and paid rent for the period to December 31, 1923, but has paid no rent for the period from January 1, 1924, to June 30, 1924, the remainder of the fiscal year. The petitioner was unable to rent the premises during that period.

[fol. c] In view of the decision in Leiter v. The United States, 271 U. S. 204, the petitioner abandoned its contention that the United States was bound for the full term to June 30, 1926. The petitioner continued to assert, however, and still contends that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act.

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*NOTE.—This refers to common law. No Ohio statute is involved as to the effect of holding over.

In other words, the petitioner contends:

1. By the Appropriation Act of February 14, 1923, 42 Stat. L. 1227, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924. There was therefore on June 30, 1923, authority to lease the property to June 30, 1924. This authority removed any impediment so far as R. S. Secs. 3732 and 3679* as amended were concerned, to the creation of a liability upon the United States ex contractu to pay rent if such liability would otherwise follow from acts of the proper officers of the United States.

2. Under the laws of Ohio, the affirmative act of holding over, even in spite of an express statement by the tenant [fol. d] that he did not intend to be bound, would create liability to pay rent just as effectively as the execution of a new lease, if the landlord treated such holding over as creating a tenancy for another year. The appropriate officer of the United States with authority to obligate the United States by reason of the Appropriation Act held over into the year for which there was an appropriation, and this act was treated by the plaintiff as creating a tenancy for another year. Under the laws of Ohio, these acts of the parties were as effective in creating a tenancy for another year as a duly executed lease would have been. There being no law of the United States to prevent, the United States was therefore bound by the one law applicable—the law of Ohio—to pay rent for another year.

The Court of Claims, however, ignored the Ohio common law, apparently believing that the United States as a tenant was not subject to the ordinary rules applicable to individuals, and held that the United States was bound only for the period of actual occupancy, for which the rent already had

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*NOTE.—Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *" And Sec. 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510, provides that: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

been paid. Judgment was therefore entered for the United States.

Reasons Relied on for the Allowance of the Writ

1. The Court of Claims decided a Federal question of substance not heretofore determined by this Court: to-wit, whether when the United States has leased real estate in a State it is bound by the local common law of landlord and tenant and thus may become bound for another year by holding over, in a case where there was statutory authority to bind the United States for such rent by reason of the fact that there was an appropriation available for the payment of the rent for the ensuing year.

[fol. e] 2. The Court of Claims decided an important question of local law in conflict with the Ohio decisions in Strong v. Schmidt, 8 Cir. Dec. 551; Rosenbaum v. Pendleton, 9 O. D. 642; Kerrish v. Brewing Company, 17 Ohio C. C. R. (N. S.) 449; which hold that the landlord may treat such a holding over as creating a tenancy for another year in spite of an express statement by the tenant that he does not intend to be bound.

3. It is believed that the Court of Claims has decided this important question erroneously on the mistaken theory that it is following the recent decision of this Court in Leiter v. The United States, 271 U. S. 204. In the Leiter case, as in the Goodyear case, there was a lease to the Veterans' Bureau for a period of years contingent upon future appropriation. In each case the United States occupied for several years and then gave notice that the term would end June 30. In each case prior to the June 30th in question there had been an appropriation for rent for the ensuing fiscal year. From this point, however, the cases differed. In the Leiter case after the appropriation there was no holding over into the ensuing fiscal year nor was there any other act to which liability to pay rent might attach. But in the Goodyear case after the appropriation there was a holding over into the ensuing year. In deciding the Leiter case this Court held that as there was after the appropriation no act which could cause liability there could be no recovery, saying:

"The leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or *by the occupation of the premises.*" (Italics ours.)

This language clearly indicates that had there been a holding over as in the Goodyear case the United States would have been liable.

[fols. f & g] 4. In the mistaken belief that it was following the Leiter cases the Court of Claims has departed from the well settled law created by its own decisions in McCollum v. United States, 17 C. Cls. 92, Connecticut Mutual Life Insurance Company v. United States, 21 C. Cls. 195, and Smoot v. United States, 38 C. Cls. 418, holding that the United States might become bound as a tenant for another year by holding over; and its decisions in Spoffard v. United States, 32 C. Cls. 452, Clifford v. United States, 34 C. Cls. 223, and Blair v. United States, 53 C. Cls. 457, holding that the local State law is to be applied as against the United States as a tenant.

5. This question is important owing to the large amount of property in the States leased by the United States. To give only one example, the appropriation for rent, light and fuel for post offices alone for the year ending June 30, 1925, was $14,416,600, 43 Stat. L. 64, 86.

Wherefore the petitioner, believing that the aforesaid judgment of the United States Court of Claims is erroneous, respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Court of Claims, as provided by law, to the end that the said case may be reviewed and determined, and upon final consideration thereof, the judgment of the United States Court of Claims may be reversed with such directions as to this Court may seem proper and in conformity with law.

Respectfully submitted.

Spencer Gordon, Dean G. Acheson, Attorneys for Petitioner.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. F-70

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,

v.

THE UNITED STATES

I. PETITION—Filed February 17, 1926

Validity of Lease to Veterans' Bureau for Five Years Contingent on Annual Appropriations. Liability of United States for One Year's Rent under Ohio Law Because of Holding Over.

The claimant respectfully represents:

1. The claimant is a corporation duly incorporated under the laws of the State of Delaware and sues on a lease to the United States for unpaid rent for the period from December 31, 1923, to June 30, 1926, or such part of the [fol. 2] same as the Court may find due under the following state of facts.

2. Under date of July 27, 1921, the Goodyear Tire & Rubber Company, a corporation organized and existing under the laws of the State of Ohio, submitted in writing a certain proposal to lease to the United States for the use of the Bureau of War Risk Insurance certain premises contained in a building located at 415 East 6th Street, Cincinnati, Ohio, to wit, the entire first, second and third floors, for a term beginning September 1, 1921, and ending June 30, 1926, at an annual rental of $33,412.83, and the entire fourth floor of said building for a term beginning April 1, 1922, and ending June 30, 1926, at an annual rental of $10,739.75. This proposal was subject to the condition that "in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available." A copy of this proposal is filed herewith marked "Claimant's Exhibit 1."

3. Under date of August 23, 1921, C. R. Forbes, Director of the Veterans' Bureau, addressed a letter to the Goodyear Tire & Rubber Company, erroneously styled "The Goodyear Tire & Rubber Company, Inc.," stating that the proposal of July 27, 1921, was accepted, subject to certain conditions expressly set forth in said letter of August 23, 1921. On October 13, 1921, the Goodyear Tire & Rubber Company signed an indorsement at the foot of said letter as follows: "We hereby assent fully to all of the foregoing terms and conditions—The Goodyear Tire & Rubber Company, By G. M. Stadelman, Vice-President, Attest Charles [fol. 3] A. Stillman, Secretary," and the seal of the Goodyear Tire & Rubber Company was thereto affixed. This proposal in writing of August 23, 1921, as so accepted October 13, 1921, constituted a lease from the Goodyear Tire & Rubber Company to the United States for the use of the Veterans' Bureau. A copy of said lease is attached hereto marked "Claimant's Exhibit 2."

4. So far as material to this case the terms of said lease were as follows: The Goodyear Tire & Rubber Company was therein designated as the lessor and the Veterans' Bureau for and in behalf of the United States of America was designated as the lessee. The lessor did thereby "lease, demise and let" the premises described in paragraph 2 hereof at a rental of $33,412.83 per annum for the first second and third floors, the rent to be paid beginning with the date of occupancy and ending June 30, 1926, and at a rental of $10,739.75 per annum for the fourth floor, the rent to be paid for a term beginning April 1, 1922, and ending June 30, 1926. It was further provided:

"That it is mutually understood and agreed that in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available, and in such event both parties hereto shall be relieved from obligation hereunder in like manner as if the term of occupancy had run its full period."

5. The contingency of an appropriation not being made as in the lease provided did not occur, in that appropria-

[fol. 4] tions were in fact made from which rent might have been paid for each of the fiscal years covering the period from October 13, 1921, to June 30, 1926, by the following statutes:

Annually for a period of four years ending June 30, 1924, by the Act of June 2, 1920, 41 Stat. L. 735.

For the fiscal year ending June 30, 1922, Act of March 4, 1921, 41 Stat. L. 1367, and Act of August 9, 1921, 42 Stat. L. 147.

For the fiscal year ending June 30, 1923, Act of June 12, 1922, 42 Stat. L. 635.

For the fiscal year ending June 30, 1924, Act of February 14, 1923, 42 Stat. L. 1227.

For the fiscal year ending June 30, 1925, Act of June 7, 1924, 43 Stat. L. 521.

For the fiscal year ending June 30, 1926, Act of March 3, 1925, 43 Stat. L. 1198.

6. The Veterans' Bureau on behalf of the United States took possession of the first, second and third floors of said demised premises October 1, 1921, and took possession of the fourth floor thereof June 1, 1922. The Veterans' Bureau on behalf of the United States occupied said premises continuously down to December 20, 1923, on which date the Veterans' Bureau vacated said premises.

7. January 9, 1922, the Goodyear Tire & Rubber Company, a corporation organized under the laws of the State of Ohio, subsequent to a reorganization thereof, assigned, transferred, and set over to the Goodyear Tire & Rubber Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and the claimant in this case, the lease between the Goodyear Tire & Rubber Company and the United States on behalf of the Veterans' [fol. 5] Bureau, dated October 13, 1921, hereinbefore described, leasing the first, second, third and fourth floors of 415 East 6th Street, Cincinnati, Ohio. A copy of this assignment is attached marked "Claimant's Exhibit 3."

8. May 1, 1922, a letter was addressed by the Acting Director of the United States Veterans' Bureau to the claimant, the Goodyear Tire & Rubber Company, Inc., and an acknowledgment of the same was made in words and figures as follows:

Cincinnati, Ohio Dist. No. 7, 415 E. 6th Street

ARW/ml. L & C-1027-ARW.

May 1, 1922.

The Goodyear Tire and Rubber Company, Inc., East Market Street, Akron, Ohio.

GENTLEMEN: In view of the decision of the Attorney General relating to contracts based on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

Respectfully, (Sgd.) L. B. Rogers. L. B. Rogers, Acting Director, U. S. Veterans' Bureau.

[fol. 6] Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

The Goodyear Tire & Rubber Company, Inc., Lessor, by G. M. Stadelman, Vice-President.

Attest: Chas. A. Stillman, Secretary. (Seal of the Goodyear Tire & Rubber Company, Inc.)

August 15th, 1922.

9. The rent for the demised premises was duly paid by the United States to the Goodyear Tire & Rubber Company and to the claimant, the Goodyear Tire & Rubber Company, Inc., down to June 30, 1923. Prior to that date officials of the United States Veterans' Bureau informed the claimant company that the United States would give up occupancy of the demised premises as of June 30, 1923. It was contended by the representatives of the Veterans Bureau that the lease in question did not extend beyond June 30, 1923, on the theory that there had been no authority in the Director of the Veterans' Bureau to make a lease for more than one fiscal year. Representatives of

the claimant contended that the lease extended to June 30, 1926, unlss there should be a failure of appropriations, which had not been the case. When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating [fol. 7] that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over.

10. Thereafter the United States continued in possession of said demised premises up to December 20, 1923, and vacated said premises on said date, and since that date has not been in possession of the same.

11. The United States has paid rent to the claimant according to the terms of said lease for the entire period up to December 31, 1923. The claimant presented a claim for rent for the balance of the term to June 30, 1926, and for the amortization of certain sums expended by the claimant for alterations under the lease. By decision of the General Accounting Office of May 16, 1925, Claim No. 047108, the claimant was allowed rent for the period to June 30, 1924, in the sum of $22,852.94. On review, however, this decision was reversed and by decision of the Comptroller General of September 5, 1925, A-10726, the claimant was allowed only the sum of $3,679.39, representing the unpaid rent for December, 1923, the last month that the United States occupied the premises, and claim for rent during the period when the United States was not in actual occupancy was totally disallowed. On application for rehearing this decision was affirmed by the Comptroller General September 24, 1925, and the claimant has never received any rent for any part of the period after December 31, 1923.

[fol. 8] 12. The claimant has made vigorous efforts to rent the demised premises to other parties for the period after December 20, 1923, but has only succeeded in finding three tenants, the Style Center Tailoring Company for a portion of the space from October 1, 1924, to January 31, 1925, at a rental of $1,200, the B. F. Goodrich Company for a portion of the space for a term beginning November 15, 1924, and expiring after June 30, 1925, for a rental up to June 30, 1926, in the sum of $8,220.12, and the Milton Ochs Company for a portion of the space for a term beginning February 1, 1925, and expiring after June 30, 1926, for a rental up to June 30, 1926, in the sum of $26,432.47.

13. None of these leases were for any part of the period from December 31, 1923, to June 30, 1924.

14. Said lease to the United States described in paragraph 3 hereof provided for the rendering of certain services by the lessor in and about the building. Owing to the fact that the United States is not occupying the space for the period from December 20, 1923, to June 30, 1926, the claimant will save in building services the sum of $13,902.37. The proportionate part of this saved during the period from December 20, 1923, to June 30, 1924, is $2,902.69.

15. By reason of the United States vacating said demised premises the claimant asserts a claim against the United States as follows:

A. On the theory that the lease was binding to June 30, 1926, claim is made as follows:

[fol. 9] $44,152.58 a year, January 1, 1924, to June 30, 1926, 3,679.38 a month, 30 months		$110,381.40
Less—		
Rental Style Center	$1,200.00	
Rental Goodrich	8,220.12	
Rental Ochs	26,432.47	
Building services not rendered	13,902.37	
	$49,754.96	49,754.96
Net claim		$60,626.44

B. On the theory that the lease only extended to June 30, 1924, or that the United States is bound for the year July 1, 1923, to June 30, 1924, by reason of holding over, claim is made as follows:

Total rent January 1, 1924, to June 30, 1924	$22,076.29
Less building services	2,902.69
Net loss on rental January to June, 1924	$19,173.60

16. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against said Government. It is the sole and absolute owner of the claim herewith presented. It has made no transfer or assignment of said claim or any part thereof, and it is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

[fol. 10] Claimant therefore prays judgment in its favor against the United States in the sum of $60,626.44.

The Goodyear Tire & Rubber Company, Inc., by Chas. A. Stillman, Secretary. Covington, Burling & Rublee, Attorneys for Claimant. Spencer Gordon, of Counsel.

Duly sworn to by Charles A. Stillman. Jurat omitted in printing.

[fol. 11] CLAIMANT'S EXHIBIT 1 TO PETITION

Proposal to Lease to the United States

We, the Goodyear Tire & Rubber Company, incorporated under the Laws of the State of Ohio, having our principal office and place of business at Akron, Summitt County, Ohio, propose to lease to the United States for the use of the Bureau of War Risk Insurance, the following described premises:

(a) The entire first, second and third floors, containing approximately 35,171 square feet of floor space, in the building located at 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, State of Ohio. The rent to be

paid shall be at the rate of Thirty-three Thousand Four Hundred and Twelve Dollars Eighty-three Cents ($33,-412.83) per annum, payable in equal monthly istallments in arrears. The term for this shall be beginning September 1, 1921 and ending June 30, 1926.

(b) The entire fourth floor, containing approximately 11,305 square feet of floor space in the building located at 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, State of Ohio. The rent to be paid shall be at the rate of Ten Thousand Seven Hundred Thirty-nine Dollars Seventy-five Cents ($10,739.75) per annum, payable in equal monthly installments in arrears. The term shall begin April 1, 1922 and end June 30, 1926.

The above premises noted at (a) and (b) are a part of the premises leased to us by The Kruse & Bahlman Hardware Company under date of January 30, 1920, all of which premises leased by them to us are described in said lease as follows:

"Situated in the City of Cincinnati, County of Hamilton and State of Ohio, viz: Commencing on the south side of Sixth Street in said City of Cincinnati at a point one hundred (100) feet east of Broadway, which said point is the northwest corner of lot No. Thirty (30) of Piatt and Spencer's Subdivision recorded in Deed Book R. I. page 108 of the records of deeds of Hamilton County, Ohio, and which said point is also the corner of Sixth Street and Scott Alley; thence eastwardly with the south line of Sixth Street two hundred and eight-four (284) feet and nine (9) inches; thence southwardly on a line at right angles to said Sixth Street eighty three (83) feet to the north line of a ten (10) foot Alley known as James Alley; thence westwardly one hundred and forty-one feet and ten (10) inches to the west line of Werner Alley which said point is the southeast [fol. 12] corner of Lot No. 34 of said Piatt and Spencer's Sub-division; thence southwardly on the west line of Werner Alley, it being a line parallel to the east line of Broadway, ninety-three (93) feet to the north line of Pioneer Street; then westwardly along the north line of Pioneer Street one hundred and forty-two (142) feet and eleven (11) inches to the east line of Scott Alley; thence northwardly along the east line of Scott Alley one hundred and

seventy-six (176) feet to the south line of Sixth Street and the place of beginning—which said property comprises lots thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), thirty-eight (38), seventeen feet and six (6) inches off the west part of lot thirty-nine (39); also lots nineteen (19), twenty (20), twenty-one (21), twenty-two (22), and twenty-three (23) of said Piatt and Spencer's subdivision; also James Alley running from the east line of Scott Street to the west line of Werner Alley, and also Werner Alley from the south side of Sixth Street to the North line of James Alley—said two alleys having been vacated by ordinance of the City of Cincinnati and being the same property leased to The Kruse & Bahlman Hardware Company by lease from Eugene H. Hughes, recorded in Lease Book 124, page 378, Records of Leases of Hamilton County, Ohio, together with four (4) story buildings and basements located thereon, consisting of a building extending from the north side of Pioneer Street, to the south side of Sixth Street, being the Northwest and Southwest divisions of premises herein leased and which two divisions shall hereafter be referred to as The Pioneer Street Building; and another building located on the Northeast division of said premises now occupied by The Waterproof Paper Company, which building shall hereafter be known as the Northeast building * * * "

The above proposal is made to the following terms and conditions:

1. It is mutually understood and agreed that in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available, and in such event both parties hereto shall be relieved from obligation hereunder in like manner as if the term of occupancy had run its full period.

2. That satisfactory light, heat, water, elevator and janitor service shall be furnished by us without additional charge.

3. That we shall repaint the walls, ceiling and woodwork of the demised premises whenever such painting is necessary, without cost to the Lessee.

[fol. 13] 4. That prior to the date of occupancy we shall cause to be made without cost to the Lessee such alterations and improvements within the demised premises, including plumbing, toilet fixtures, light fixtures, elevator alterations, partitions, cutting and providing a satisfactory entrance to Pioneer Street, according to plans and specifications hereto attached and marked "Exhibit A" and initialed for purposes of identification by J. J. B.

5. That we shall, subsequent to the effective date of this lease, cause to be made alterations as may be required from time to time during the life of this agreement or any renewal thereof, to make more efficient the work and operation of the Bureau of War Risk Insurance, and shall perform all such work of alteration in accordance with plans and specifications to be approved by the Director of the Bureau of War Risk Insurance prior to the undertaking of the actual work of alteration. It is hereby agreed that we shall be reimbursed for the actual cost of such work of alteration and material used, and that the actual work of installation of special fixtures and equipment is included in the terms of this condition, such special fixtures and equipment to be furnished at the expense of, and to be and remain the exclusive property of the Lessee, or if the Lessee so elects, such work of installation may be done directly by the Lessee.

6. It is an expressed condition and it is mutually understood and agreed that no changes or alterations or improvements shall be required to be made by us which shall be contrary to or in conflict with the terms and conditions relative thereto incorporated in the lease to us from The Kruse & Bahlman Hardware Company, above referred to, which terms and conditions are hereto attached marked "Exhibit B" and made a part hereof and which for purposes of identification is initialed H. S. K.

[fol. 14] 7. That we will warrant and defend to the Lessee, its officers and agents, the quiet and peaceful possession and occupancy of the aforesaid demised premises, and in

case of any disturbance by suit or otherwise, will defend the same free of charge to the Lessee before the proper State or United States Courts.

8. That for and in consideration of the faithful performance of the conditions and stipulations of this agreement, the Lessee shall pay to us the sum or sums specified in Condition — hereof, and such other sums for which the Lessee may become liable under the provisions of Conditions and payment to be made at the end of each calendar month, or as soon as practicable thereafter. Should the premises be relinquished before the close of any monthly period, the rental for the last period shall be only the pro rata part of the monthly rental.

9. We covenant and agree to pay all taxes and assessment of every nature that may be levied or assessed upon said demised premises during the term of this lease or renewals thereof, if any.

10. That we, at our own expense, shall make all repairs necessary to said demised premises during the term of this lease and of the renewals thereof, if any, and that no structural changes shall be made by us without first obtaining the written consent of the Lessee thereto.

11. All improvements fixed to, or erected, or placed in or upon said demised premises by the Lessee shall be and remain the exclusive property of the Lessee; provided, however, that the same unless sold or otherwise disposed of, shall be removed by the Lessee within fifteen (15) days after vacating said demised premises.

[fol. 15] 12. At the expiration of this lease, or renewals thereof, if any, the said Lessee agrees to return all the demised premises in like good order as when received, depreciation, use, ordinary wear and tear, fires and other unavoidable casualty excepted.

13. That in the event the building on said demised premises, or any part thereof, shall be destroyed by fire or other casualty or shall without fault on the part of the Lessee become untenantable or unfit for occupancy in the opinion of the Director of the Bureau of War Risk Insurance, rent of such building or part of building as shall be so rendered

untenantable or unfit for occupancy, or a proportionate part of such rent, shall cease and remain suspended and abated for the whole period during which occupancy thereof shall be prevented by such casualty or cause; and in such event this lease may be cancelled by said Lessee at its option, provided, however, that nothing herein shall bind us or obligate us in any way which shall be contrary to or in conflict with the provisions with reference to the destruction or partial destruction by fire contained in the lease to us from The Kruse & Bahlman Hardware Company above referred to, said provisions being attached hereto marked "Exhibit C" and hereby made a part hereof and which for purposes of identification is initialed H. S. K.

14. That no third person has been employed to solicit or obtain this agreement, or to cause or procure the same to be obtained upon compensation in any way contingent in whole or in part upon such procurement; that there has not been paid, or promised, or agreed to be paid to any third person in consideration of services in connection therewith, any brokerage, commission or percentage upon the amount [fols. 16-18] receivable hereunder; that in estimating the rental charge no sum has been included therein by reason of any such brokerage, commission or percentage; that all moneys receivable hereunder are free from obligation to any other person for services rendered or supposed to have been rendered in the procurement of this agreement; that any breach of this condition shall constitute adequate cause for the an-ulment of this agreement by the United States; and that the United States may retain to its own use from any sum due or to become due hereunder, an amount equal to any brokerage, commission or percentage so paid, or promised, or agreed to be paid; provided, however, that this condition does not apply to procurement through a bona fide real estate agency, or through a bona fide commercial representative employed by us in the regular course of business in dealing with Lessees other than the Government.

15. That no Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any part or share in this agreement, or to any benefit to arise therefrom.

Respectfully, The Goodyear Tire & Rubber Company.
(Signed) Edw. G. Wilmer, President.

Attest: (Signed) W. D. Shilts, Ass't Secretary.
Akron, Ohio, July 27, 1921.

[fol. 19] CLAIMANT'S EXHIBIT 2 TO PETITION

Treasury Repartment, Bureau of War Risk Insurance, Washington

August 23, 1921.

In reply refer to L. & C. Room 1025.
The Goodyear Tire & Rubber Co., Inc., East Market Street, Akron, Ohio.

GENTLEMEN: Pursuant to authority vested in the Director of the Veterans' Bureau, by Act of Congress (H. R. 361—67th Congress) your proposal of July 27, 1921, to lease to the United States for the use of the Veterans Bureau, approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street Cincinnati, Ohio, for office purposes, is hereby accepted subject to the following conditions:

That the Veterans' Bureau for and in behalf of the United States of America (hereinafter designated as lessee) of the first part, and the Goodyear Tire and Rubber Co., Inc. (hereinafter designated as lessor) of the second part, do hereby covenant and agree with each other as follows:

1. That the said lessor shall, and by these presents does hereby lease, demise, and let to the lessor the following described premises, to have and to hold the same with their appurtenances unto the lessee under the conditions named below, viz:

(a) The entire first (1st), second (2nd) and third (3rd) floors, containing approximately 35,171 square feet of floor space in the building located at No. 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, State of Ohio. The rent to be paid for the term beginning with

date of occupancy and ending June 30, 1926, shall be at the rate of Thirty-three thousand four hundred and twelve Dollars, and eighty-three cents ($33,412.83) per annum, [fol. 20] payable in equal monthly installments in arrears.

(b) The entire fourth (4th) floor, containing approximately 11,305 square feet of floor space in the building located at No. 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, State of Ohio. The rent to be paid for the term beginning April 1, 1922, and ending June 30, 1926, shall be at the rate of Ten Thousand seven hundred and thirty-nine Dollars and seventy-five cents ($10,739.75) per annum, payable in equal monthly installments in arrears.

(c) That it is mutually understood and agreed that in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available, and in such event both parties hereto shall be relieved from obligation hereunder in like manner as if the term of occupancy had run its full period.

(d) That satisfactory light, heat, water, elevator and janitor service shall be furnished by the lessor without additional charge.

(e) That the lessor shall repaint the walls, ceilings and woodwork of the demised premises whenever such painting is necessary without cost to the lessee.

(f) That prior to the date of the occupancy the lessor shall without cost to the lessee cause to be made within the demised premises described as the first (1st), second (2nd) and third (3rd) floors in Condition 1—(a) hereof, alterations and improvements including plumbing, toilet fixtures, light fixtures, elevator alterations, partitions, cutting and providing a satisfactory entrance to Pioneer Street in accordance with the plans and specifications hereto attached and marked "Exhibit A" and initialed for purpose of identification "J. J. B." and the lessor herein agrees to make without cost to the lessee additional alterations, as may be considered necessary by the Director of the Veterans' Bu-

reau to better fit the premises for the use and occupancy [fol. 21] of the lessee, such alterations and improvements to cost not exceeding one thousand ($1,000) Dollars.

That prior to the date of occupancy the lessor shall cause to be made without cost to the lessee herein, changes, alterations and improvements within the demised premises described as the fourth (4th) floor containing approximately eleven thousand three hundred and five (11,305) square feet of floor space in Condition 1—(b) hereof as may be considered necessary by the Director of the Veterans' Bureau, such alterations and improvements to be made in accordance with plans and specifications to be approved by the lessee and the actual cost thereof to be paid by the lessor to not exceed the sum of five thousand ($5,000) dollars.

2. That the lessor shall, subsequent to the effective date of this lease, cause to be made alterations as may be required from time to time during the life of this agreement or any renewal thereof, to make more efficient the work and operation of the Veterans' Bureau and shall perform all such work of alteration in accordance with plans and specifications to be approved by the Director of the Venterans' Bureau prior to the undertaking of the actual work of alteration. It is hereby agreed that the lessor shall be reimbursed for the actual cost of such work of alteration and that the actual work of installation of special fixtures and equipment is included in the terms of this condition, such special fixtures and equipment to be furnished at the expense of, and to be and remain the exclusive property of the lessee, or if the lessee so elects, such work of installation my be done directly by the lessee.

3. That the parties hereto agree and it is mutually understood that no changes or alterations or improvements will be required or made within the demised premises which shall be contrary to or in conflict with the terms and conditions relative thereto incorporated in the lease existing between the lessor herein and the Kruse and Bahlman Hard- [fol. 22] ware Company, the said the terms and conditions of said lease are hereto attached, marked "Exhibit B"

and made a part hereof and for purpose of identification is initialed "H. S. K."

4. That the said lessor will warrant and defend to the lessee, its officers and agents, the quiet and peaceful possession and occupancy of the aforesaid demised premises, and in case of any disturbance by suit or otherwise, will defend the same free of charge to the lessee before the proper State or United States Courts.

5. That for and in consideration of the faithful performance of the conditions and stipulations of this agreement, the lessee shall pay to the lessor the sum or sums specified in Condition "1" (a) and (b) hereof, and such other sums for which the lessee may become liable under the provisions of Conditions "2" and "9;" payment to be made at the end of each calendar month, or as soon as practicable thereafter. Should the premises be relinquished before the close of any monthly period, the rental for the last period shall be only the pro-rata part of the monthly rental.

6. The lessor covenants and agrees to pay all taxes and assessments of every nature that may be levied or assessed upon said demised premises during the term of this lease or renewals thereof, if any.

7. That the lessor at its own expense shall make all repairs necessary to said demised premises during the term of this lease and of the renewals thereof, if any, and that no structural changes shall be made by the lessor without first obtaining the written consent of the lessee thereto.

8. All improvements fixed to, or erected, or placed in or upon said demised premises by the lessee shall be and remain the exclusive property of the lessee; provided, however, that the same unless sold or otherwise disposed of, shall be removed by the lessee within fifteen (15) days after vacating said demised premises.

9. At the expiration of this lease, or renewals thereof, if any, the said lessee agrees to return the demised premises in like good order and condition as when received depreciа-

tion, use, ordinary wear and ear, fires and other unavoidable casualty excepted.

[fol. 23] 10. That in the event the building on said demised premises or any part thereof, shall be destroyed by fire or other casualty, or shall without fault on the part of the lessee become untenantable or unfit for occupancy in the opinion of the Director of the Veterans' Bureau, rent of such building or part of building as shall be so rendered untenantable or unfit for occupancy, or a proportionate part of such rent shall cease and remain suspended and abated for the whole period during which occupancy thereof shall be prevented by such casualty or cause; and in such event this lease may be cancelled by said lessee at its option provided, however, that nothing herein shall bind or obligate the lessor in any way which shall be contrary to or in conflict with the provisions with reference to the destruction or partial destruction of the premises by fire contained in the existing lease between the lessor herein and The Kruse and Bahlman Hardware Company, said provisions being attached hereto, marked "Exhibit C" and hereby made a part hereof and for purpose of identification is initialed "H.S.K."

11. That no third person has been employed to solicit or obtain this agreement, or to cause or procure the the same to be obtained upon compensation in any way contingent in whole or in part upon such procurement; that there has not been paid, or promised, or agreed to be paid to any third person in consideration of services in connection therewith, any brokerage, commission or percentage upon the amount receivable hereunder; that in estimating the rental charge no sum has been included therein by reason of any such brokerage, commission or percentage; that all moneys receivable hereunder are free from obligation to any other person for services rendered or supposed to have been rendered in the procurement of this agreement; that any breach of this condition shall constitute adequate cause for the annulment of this agreement by the United States; and that the United States may retain to its own use from any sum due or to become due hereunder, an amount equal to any brokerage, commission

or percentage so paid, or promised, or agreed to be paid; [fols. 24-49] provided, however, that this condition does not apply to procurement through a bona fide real estate agency, or through a bona fide commercial representative employed by the lessor in the regular course of business in dealing with lessee other than the Government.

12. That no Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any part or share in this agreement, or to any benefit to arise therefrom.

You are requested to retained the original of this communication and write upon the accompanying copies thereof, date and sign, your unqualified assent to the foregoing covenants and conditions, and return the copies promptly to this Bureau together with authenticated evidence of authority of the person signing on behalf of the Corporation. It is requested that the corporate seal be affixed to each assent copy.

Respectfully, (Signed C. T. Forbes, Director Veterans' Bureau.

We hereby assent fully to all the foregoing terms and conditions October 13, 1921.

The Goodyear Tire & Rubber Co., by G. M. Stadelman, Vice-President.

Attest: Chas. A. Stillman, Secretary. (Seal.)

[fol. 50] CLAIMANT'S EXHIBIT 3 TO PETITION

Assignment of Lease

The Goodyear Tire & Rubber Company, a corporation duly organized and existing under the laws of the State of Ohio, for and in consideration of the sum of One Dollar ($1.00), receipt of which is hereby acknowledged, and of the covenants hereinafter contained, does hereby assign, transfer and set over unto The Goodyear Tire & Rubber Company, Inc., a corporation duly organized and existing under the laws of the State of Delaware, a certain lease

between The Goodyear Tire & Rubber Company as Lessor, and the U. S. Veterans' Bureau entered into under date of October 13, 1921, leasing certain premises, to wit:

(a) The entire first, second and third floors containing approximately 35,171 square feet of floor space in the building located at 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, and State of Ohio.

(b) The entire fourth floor containing approximately 11,305 square feet of floor space in the building located at 415 East Sixth Street, in the City of Cincinnati, County of Hamilton, and State of Ohio.

The said The Goodyear Tire & Rubber Company, Inc., a Delaware corporation, in consideration of the foregoing assignment, does hereby agree and covenant that it will duly and punctually observe and perform all of the terms, conditions and covenants in said lease contained which are to be performed and observed by the said Lessor.

[fol. 51] In witness whereof, the said The Goodyear Tire & Rubber Company, an Ohio Corporation, and the said The Goodyear Tire & Rubber Company, Inc., a Delaware Corporation, have caused this instrument to be executed by their duly authorized officers as of the 9th day of January, 1922.

The Goodyear Tire & Rubber Company, by G. A. Stadelman. Attest: Chas. A. Stillman. (Seal.)
The Goodyear Tire & Rubber Company, Inc., by Frank K. Espenhain, Vice-President. Attest: W. D. Shilts. (Seal.)

Legal features approved. R. W. B. 12/10/24.

[fol. 52] II. Defendant's Demurrer—Filed April 16, 1926

Defendant demurs to the petition in the above-entitled case for the reason that it fails to state a cause of action against the United States.

Herman J. Galloway, Assistant Attorney General.
John E. Hoover, Attorney.

III. Argument and Submission of Demurrer

On May 17, 1926, the demurrer in this case was argued and submitted by Mr. John E. Hoover, for the defendant, and by Mr. Spencer Gordon, for the plaintiff.

[fol. 53] IV. Opinion of the Court by Graham, J., on Demurrer to Petition—Filed June 14, 1926

On Demurrer to the Petition

Graham, Judge, delivered the opinion of the court.

The plaintiff sues for recovery of unpaid rent under a lease entered into on behalf of the United States by C. R. Fobes, Director of the Veterans' Bureau. The lease was for the first, second, third, and fourth floors of a building located in Cincinnati, Ohio, and was entered into August 23, 1921. It was to continue until June 30, 1926. Prior to June 30, 1923, a representative of the Veterans' Bureau notified plaintiff that the United States would give up occupancy of the premises as of June 30, 1923. What followed is stated thus in plaintiff's petition:

"When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over."

Plaintiff originally asked for the recovery of the rent to June 30, 1926. However, it has abandoned this claim and is only claiming rent for the period from December 31,

1923, to June 30, 1924. Alluding to the validity of the lease to June 30, 1926, plaintiff in its brief says:

"Claimant's counsel have made a reexamination of the authorities on this question and have decided to abandon this point."

So that the case narrows down to the question whether the United States "was bound for the entire year ending June 30, 1924, by reason of holding over after June 30, 1923."

As stated, the Government held over and occupied the premises after June 30, 1923, to December 20, 1923, and paid rent to December 31, 1923. After the Government [fol. 54] gave notice of its intention to vacate and surrender the premises as of June 30, 1923, it found it desirable to hold over for awhile and notified plaintiff to that effect, stating that it had no intention to pay rent for a longer time than the actual period of occupancy. Thereupon it was contended by plaintiff that if the Government held over it would be bound for the whole year, under the laws of the State of Ohio.

It does not appear that plaintiff took any steps to recover possession of the premises. There was no express contract or coming together of the minds of the parties on the subject. The Government said that it would hold over and would pay only for the time it occupied the premises. The plaintiff did nothing more than make a "contention" that the United States would be bound for the rent to June 30, 1926, or at least for the remainder of the year ending June 30, 1924, under the laws of the State of Ohio.

In the brief of plaintiff's attorneys it is stated that "there was no agreement whatsoever between the claimant and the United States as to the type of tenancy under which the United States was to occupy the premises after June 30, 1923." It is therefore admitted, and could not be denied, that there was no express agreement as to the tenancy, and consequently no express contract has been shown.

Under these circumstances the best that can be said for plaintiff is that the United States by holding over would have been liable for the rental value of the premises for the period for which they were used. It seems to be conceded that the rental fixed by the lease was the rental value.

The United States occupied the premises for six months and paid the rental fixed by the lease for that period. It could not under the circumstances be held for anything more.

The demurrer should be sustained and the petition dismissed, and it is so ordered.

Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 55] V. Judgment—June 14, 1926

At a Court of Claims held in the City of Washington on the 14th day of June, A. D., 1926, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of opinion that the demurrer is well taken.

It is therefore ordered and adjudged that the defendant's said demurrer be sustained and that the petition be and the same hereby is dismissed.

VI. Proceedings After Entry of Judgment

On July 16, 1926, the plaintiff filed a motion for a new trial.

On October 25, 1926, the court entered the following order on said motion:

Order

It is ordered by the Court this 25th day of October, 1926, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 57 & 58] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

STIPULATION AS TO PRINTING OF THE RECORD—Filed January 6, 1927

It is stipulated and agreed that the Clerk of the Supreme Court of the United States in printing the record in the case of the Goodyear Tire & Rubber Company, Inc. v. The United States, No. F 70 in the Court of Claims of the United States, in connection with the petition for certiorari to be filed on behalf of the Goodyear Tire & Rubber Company, Inc., may omit from such printing certain parts of the exhibits to the petition in the court below the printing of which was waived by that court, to wit:

Exhibit B, Record page 17.
Exhibit C, Record page 18.
Exhibit C, Record page 25.
Exhibit B, Record page 26.
Specifications of Labor and Materials, Record pages 27 to 29, inclusive.
Specifications for Alterations, Record pages 30 to 48, inclusive.
Certified Copy of Minutes, Record page 49.

William D. Mitchell, Solicitor General. Covington, Burling & Rublee, Attorneys for Petitioner.

O. K. H. J. Galloway, J. E. H.

[fol. 59] [File endorsement omitted.]

Endorsed on cover: File No. 32,383. Court of Claims. Term No. 816. The Goodyear Tire & Rubber Company, Inc., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed January 6, 1927. File No. 32,383.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1927

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6632)

Office Supreme Court, U. S.
FILED
FEB 10 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 159

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

SPENCER GORDON,
DEAN ACHESON.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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TABLE OF STATUTES CITED.

Act of February 13, 1925, 43 Stat. L. 936, 939.... 1
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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

Report of Opinion Below.

The opinion of the Court of Claims (Rec. p. 25) has not been reported.

Jurisdiction.

This is on petition for certiorari to the Court of Claims under Section 3 (b) of the Act of February 13, 1925, 43 Stat. L. 936, 939. The judgment was entered

June 14, 1926 (R. 27). A motion for new trial was filed July 16, 1926, and was overruled October 25, 1926 (R. 27). The petition for certiorari was filed January 6, 1927 (R. 28).

Statement of the Case.

The petitioner sues for unpaid rent under a lease to the United States for the use of the Veterans' Bureau at an annual rental of $44,152.58 of property in Cincinnati, Ohio.

This lease was dated in 1921 and by its terms was to continue until June 30, 1926, provided there were sufficient appropriations from year to year. Prior to June 30, 1923, representatives of the Veterans' Bureau notified the petitioner that the United States would give up occupany of the premises as of June 30, 1923.

Prior to June 30, 1923, an act had been passed providing a sufficient appropriation for such rent for the period from June 30, 1923, to June 30, 1924, 42 Stat. L. 1227, 1243. What followed is thus stated in the plaintiff's petition:

> "When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United

States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws* of the State of Ohio by reason of holding over." (Rec., p. 2)

The United States continued in possession until December 20, 1923, and paid rent for the period to December 31, 1923, but has paid no rent for the period from January 1, 1924, to June 30, 1924, the remainder of the fiscal year. The petitioner was unable to rent the premises during that period.

In view of the decision in Leiter v. United States, 271 U. S. 204, the petitioner abandoned its contention that the United States was bound for the full term to June 30, 1926. The petitioner continued to assert, however, and still contends that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act.

In other words, the petitioner contends:

1. By the Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924. There was therefore on June 30, 1923, authority to lease the property

*NOTE.—This refers to common law. No Ohio statute is involved as to the effect of holding over.

to June 30, 1924. This authority removed any impediment so far as R. S. Secs. 3732 and 3679* as amended were concerned, to the creation of a liability upon the United States ex contractu to pay rent if such liability would otherwise follow from acts of the proper officers of the United States.

2. Under the laws of Ohio, the affirmative act of holding over, even in spite of an express statement by the tenant that he did not intend to be bound, would create liability to pay rent just as effectively as the execution of a new lease, if the landlord treated such holding over as creating a tenancy for another year. The appropriate officer of the United States with authority to obligate the United States by reason of the Appropriation Act held over into the year for which there was an appropriation, and this act was treated by the plaintiff as creating a tenancy for another year. Under the laws of Ohio, these acts of the parties were as effective in creating a tenancy for another year as a duly executed lease would have been. There being no law of the United States to prevent, the United States was therefore bound by the one law applicable—the law of Ohio—to pay the rent for another year.

The Court of Claims, however, ignored the Ohio common law, apparently believing that the United States

*NOTE.—Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *" And Sec. 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510, provides that: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

as a tenant was not subject to the ordinary rules applicable to individuals, and held that the United States was bound only for the period of actual occupancy, for which the rent already had been paid. Judgment was therefore entered for the United States.

Assignment of Errors.

1. The Court of Claims erred in not holding that when the United States had leased real estate in Ohio it was bound by the Ohio common law of landlord and tenant and thus became bound for another year by holding over, where there was statutory authority to bind the United States for such rent by reason of the fact that there was an appropriation available for the payment of the rent for the ensuing year.

2. The Court of Claims erred in not following the Ohio common law that the landlord may treat such a holding over as creating a tenancy for another year in spite of an express statement by the tenant that he does not intend to be bound.

3. The Court of Claims erred in sustaining the demurrer and in dismissing plaintiff's petition.

Argument.

Summary of Argument.

The plaintiff's contention in brief is as follows:

1. The attempted lease by the Veterans' Bureau for five years subject to appropriations each year resulted

in a lease for one year with option on the part of the United States to renew. McCollum v. United States, 17 C. Cls. 92; Smoot v. United States, 38 C. Cls. 418. Prior to June 30, 1923, the United States was therefore in possession under an existing lease.

2. As a tenant of Ohio property the United States was subject to the laws of Ohio. United States v. Bostwick, 94 U. S. 53; Clifford v. United States, 34 C. Cls. 223; Connecticut Mutual Life Insurance Company v. United States, 21 C. Cls. 195; Spoffard v. United States, 32 C. Cls. 452; Blair v. United States, 53 C. Cls. 457.

3. Under the common law of Ohio, where rent is reserved annually, and the tenant holds over and states that he does not intend to be bound for another year but the landlord states that he intends to hold the tenant for another year, the tenant is held for the entire succeeding year. Strong v. Schmidt, 8 Cir. Dec. 551, Rosenbaum v. Pendleton, 9 O. D. 642, Kerruish v. The Cleveland & Sandusky Brewing Company, 17 Ohio C. C. R. (N. S.) 449.

4. There is nothing in the United States statutes or decisions of the Federal courts which prevents this rule from applying in the present case. In order to hold the United States there need only be (1) authority to bind the United States for the ensuing year, (2) an act by the authorized officers. Leiter v. United States, 271, U. S. 204.

5. Prior to June 30, 1923, a sufficient appropriation act had been passed covering the period from June 30, 1923, to June 30, 1924, so that there was authority to bind the United States for rent, 42 Stat. L. 1227, 1243.

6. It was not necessary that the Government officials enter into an express written contract in order to bind

the United States. So long as there was an appropriation available they could bind the United States by doing the thing that the law of Ohio provided would make the tenant liable for another year, that is, by holding over. McCollum v. United States, *supra,* Smoot v. United States, *supra,* Connecticut Mutual Life Insurance Company v. United States, *supra,* Leiter v. United States, *supra.*

The Leiter Case Indicates that United States May be Bound by Holding Over.

In the case of Leiter v. United States, *supra,* there was a lease for five years subject to appropriations as in the case at bar. But in that case *there was no occupation* beyond the fiscal year ending June 30, 1922, and therefore the Government was not held for the ensuing year. The case, however, clearly indicates that had there been occupation into the next year the Government would have been bound. The opinion is in part as follows:

> "A lease to the Government for a term of years when entered into under an appropriation available for but one fiscal year is binding on the Government only for that year. McCollum v. United States, 17 C. Cls., 92, 104; Smoot v. United States, 38 C. Cls. 418, 427. And it is plain that to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that *the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year;* thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such

appropriation for the subsequent year. This conclusion is in entire accord with Bradley v. United States, 98 U. S. 104, 114, 115. * * * "

"In the present case, in accordance with the notice of the Veterans' Bureau that it would surrender the premises on June 30, 1922, *the Government did not occupy the premises after that date.* That is, although a lump sum appropriation had meanwhile been made for the rental expenses of the Veterans' Bureau for the next fiscal year—in which no reference was made to these specific leases—*the leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or by the occupation of the premises.* So the Government did not become liable for the payment of rent after the surrender of the premises." (Italics ours.) (p. 207, 208.)

It is clear that the Leiter case has a vital difference from the case at bar in that in the case at bar the premises were occupied into another year, whereas in the Leiter case there was no occupation into another year. And it is by reason of this holding over that the claimant contends that the United States became bound in the case at bar. Applying the rule as laid down in the Leiter case to the case at bar we find the following:

The Leiter case states that there must be two elements in order to hold the Government:

1. An appropriation available for the payment of the rent. That existed in the present case. By the Appropriation Act of February 13, 1923, 42 Stat. L 1227, 1243, appropriation had been been made available for "rentals and alterations" for the Veterans' Bureau for the fiscal year ending June 30, 1924.

2. The Government by its duly authorized officers must affirmatively continue the lease for such subse-

quent year. This "affirmative" continuation was done by the holding over into the next fiscal year. The Leiter case does not say that the "affirmative continuation" must be by a written contract. On the contrary the Leiter case calls particular attention to the fact that the premises were not occupied and that "the leases were not continued under this appropriation for the next year either by specific agreement to that effect *or by the occupation of the premises.*" The fair inference from this language is that had there been occupation it would have been considered as an affirmative continuation of the lease if the laws of the state where the property was located so provided.

Earlier Decisions of the Court of Claims Hold That United States May be Bound by Holding Over.

The foregoing view of the Leiter case is supported by the earlier decisions of the Court of Claims on this question.

In McCollum v. U. S., 17 C. Cls. 92, that Court in the following language stated that the United States might become bound to pay rent for another year by staying in possession after the expiration of its lease:

> "So far, therefore, as the contract relates to that fiscal year it was lawfully made and was binding on the defendants. Beyond that its only force was to give the Postmaster General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the

year. *If he should occupy the premises after the beginning of the new year, he might be held to have renewed the obligation on the part of the defendants for that one year.*" (Italics ours.) (p. 104.)

The case of Smoot v. United States, 38 C. Cls. 418, is a direct authority for the proposition that a lease may be "affirmatively continued" for another year by the United States as lessee simply by virtue of the fact that the United States remains in possession of the premises into the next fiscal year. There an attempt was made to create a lease for five years when there was an appropriation only for one year. The court held the effect of the lease, plus occupation thereunder, created a tenancy to the end of the first fiscal year, with an option in the United States to renew for each succeeding year in the event that there was an adequate appropriation. *The United States remained in possession up to and after the end of the third fiscal year, and vacated the premises in the middle of the fourth fiscal year just as in the case at bar.* The Court of Claims held that by remaining in possession into the fourth fiscal year the United States became liable for rent to the end of that fiscal year, although it only occupied the premises half of the year, *and the plaintiff was given a judgment for the rent for the remainder of the year, including the part thereof that the building was not occupied.**

The case of Connecticut Mutual Life Insurance Company v. United States, 21 C. Cls. 195, is another case in which the United States was held liable as a

*NOTE.—It was held that the use of one room by a deputy marshal into the *next* year might have been for his personal purposes and was not an authorized occupancy by the United States, and there being no other occupancy the United States was not held for rent beyond the current fiscal year.

tenant for another year's rent because the United States remained in possession of the premises after the expiration of its lease. There the lease expired June 30, 1878, the end of the fiscal year. The United States, however, remained in possession until January, 1879. The court held that by so doing it became liable for rent to the end of the fiscal year ending June 30, 1879, although the tenant had occupied only for part of the fiscal year. The court clearly recognized that there might be a tenancy created under the State law without an express agreement, saying:

> "*From this state of facts springs* the relation of landlord and tenant under a lease from year to year." (p. 199)

The foregoing cases demonstrate that a situation may be created by agents of the United States holding into part of another fiscal year whereby the United States becomes bound for rent for that entire fiscal year. In other words, *the holding into the next year* may be the "affirmative act" referred to in the Leiter case, which in addition to an appropriation is all that is necessary to bind the United States.

Law of Ohio Should Be Applied.

This Court in the case of United States v. Bostwick, 94 U. S. 53, involving a question of landlord and tenant law, said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the

same circumstances will be implied against them." (p. 66)

In Clifford v. United States, 34 C. Cls. 223, the Court of Claims held:

> "* * * When it (the United States) goes into State territory to acquire an estate or right in or to real property by purchase, the law of the State controls and regulates the rights and liabilities of the contracting parties." (p. 232)

This was a case involving the New York law. The Court of Claims implied an agreement on the part of the United States because under the decisions of the courts of the State of New York *where the property was located,* such an agreement had been implied on the part of an individual holding under a similar tenancy.

In Connecticut Mutual Life v. United States, 21 C. Cls. 195, heretofore discussed, the Court was most careful to apply the Illinois law, citing Illinois statutes and cases (page 199). To the same effect as applying the local law are Spoffard v. United States, 32 C. Cls. 452, 457, and Blair v. United States, 53 C. Cls. 457.

In the Absence of Any Agreement, the Ohio Law Created a Tenancy for Another Year from the Fact of Holding Over.

The general rule as to the effect of holding over after the termination of a lease is stated in the leading case of Baltimore & Ohio Railroad Co. v. West, 57 Ohio State 161, where the Court said:

> "By holding over after the expiration of the term into the next year and paying the rent at

> the same rate for a part of that year, the plaintiff in error became a tenant for that year upon the terms of the former occupancy, and was not relieved from its obligation to pay the rent for the balance of the year by the abandonment of the premises * * *" (p. 167).

In Rosenbaum v. Pendleton, 9 O. D. 642, it was contended that the general rule as above stated did not apply when, by express declaration, the tenant repudiated the terms of the former lease.* The Court rejected this contention, saying:

> "The language of the Supreme Court (in Baltimore & Ohio Railroad Company v. West) is 'the agreement arises by implication of law from the conduct of the parties.' It is the contention of the plaintiff in error that such an implication cannot arise, or if it does is rebutted by the express declaration of the tenant that he refuses to be bound to the payment of the rent in the amount of the old terms. We are of opinion that this cannot be so; that the *implication arising from the tenant's act must obtain and cannot be rebutted or overthrown by words expressed inconsistent with the legal implication arising from the act.*"

The Court then gave the quotation below** from Strong v. Schmidt, 8 Cir. Dec. 551, and continued:

---

*An express agreement between the landlord and tenant that the continuation in possession will be for a term other than from year to year will, of course, be recognized.

**"The rule of law is,—it is said that the presumption of law is, that he holds under the former contract from year to year. The language is varied by different courts in delivering the opinions. By some it is said to be a presumption, by some it is said to be an implied contract, and by some, it is said to be a constructive contract, but no matter what it is called the law clearly is that where the party has continued in possession after the termination of a year's lease, and the landlord has accepted rent from him, that the lease holds for another year, and that the same is binding and obligatory upon both parties as it would be if re-executed." Strong v. Schmidt, 8 Cir. Dec. 551, 554.

"The case of Strong v. Schmidt, *supra*, fairly means that where there is no new expressed agreement, no matter how far the expressed views of the parties may be apart and no matter how far their minds may be from meeting, yet, in the absence of any agreement, and because of the absence of any express agreement the law will imply the agreement which arises from that which is done, it being impossible to arrive at an agreement from that which is said."

Another case holding that a tenant may not question the effect of his holding over is Kerruish v. Brewing Company, 17 Ohio C. C. R. (N. S.) 449. This was a suit to recover from the lessee annual rental for the year next succeeding the original term, because of the holding over of such lessee beyond the expiration of the original term by its sub-tenant's occupancy of a part of the premises. It was held that the non-assent of the lessee to the sub-tenant's holding over was immaterial, and that the trial court erred in refusing to grant the following charge requested by plaintiff, which correctly stated the law:

"7. *Where a tenant holds over the term of a lease, either by remaining in possession of the premises personally or through his tenants or sub-tenants, his intentions and desires as to the lease are wholly immaterial. Actions speak louder than words, and the tenant, by his very act in remaining in possession of the premises after the term, gives the landlord the choice of electing to treat him as a tenant for the new term, or as a trespasser, and the landlord has this election wholly independent of any desires, wishes, or intentions on the part of the tenant.*"

The cases discussed thus demonstrate that the Ohio law in reference to leases where rent is reserved on an annual basis is as follows:

1. Where a tenant holds over into another year he can make an express agreement with his landlord that the possession will be from month to month or for any other agreed period, and such an express agreement will be recognized.

2. If the tenant holds over without saying anything an agreement for another year will be implied.

3. If the tenant holds over and expressly states that he does not wish to become a tenant for another year but the landlord does not agree with the tenant that his tenancy will be for any period other than a year, the parties thus disagreeing as to the effect of the holding over, as in the case at bar, a tenancy for another year will be implied.

The Fact That the Original Lease Could Not Run for Five Years Owing to Lack of Attestation and Acknowledgment Required by the Ohio Laws, Has No Bearing on the Rule in Ohio Creating a Tenancy from Year to Year by Reason of Holding Over.

The original lease was perhaps not effective for its full term since it was not acknowledged or witnessed as required by the statutes of Ohio. But these statutes further provided: (Rev. Stat. Ohio, Sec. 4112.)

> "Nothing in this chapter contained shall affect the validity of any lease of school or ministerial

> lands for any term not exceeding ten years *or of any other lands for any term not exceeding three years or require such lease to be attested, acknowledged or recorded.*" (Italics ours.)

Under this statute and the decisions of the Ohio courts, where a tenant enters and pays rent under an attempted lease for five years which is ineffective because of deficient attestation or acknowledgment he becomes a tenant from year to year. And if such tenant holds over into another year he becomes a tenant for that additional year just as though his original lease had been entirely valid. Thus in Baltimore & Ohio Railroad Co. v. West, 57 Ohio State 161, the Court said:

> "In this case though the written agreement was ineffectual as a lease for the term of five years on account of the omission of the parties to acknowledge its execution and have it recorded, the plaintiff in error, by taking possession and paying the rent under the agreement, became a tenant from year to year at the annual rent fixed by it, and payable according to its terms; and, by holding over after the expiration of the term * * * became a tenant for that year upon the terms of the former occupancy * * *." (p. 167)

It is thus apparent that if the lease in the case at bar was ineffective as a lease for five years under the Ohio law, as contended by the defendant in its brief, there was nevertheless an entry by the Government which created a tenancy from year to year under the Ohio law, and since the Government held over after June 30, 1923, a tenancy was created for the year ending June 30, 1924, under the decision in Baltimore & Ohio Railroad Co. v. West, which has just been quoted.

Let us now look at the situation from another point

of view: It seems to be the contention of the defendant that the effect of the Federal statutes and court decisions was to reduce the lease to one for a year with option to renew from year to year. If this is so of course it became a lease for "a term not exceeding three years." By Section 4112 of the Revised Statutes of Ohio, which is quoted above, it did not have to be attested, acknowledged or recorded. The occupancy by the United States for the period from 1921 to June, 1923, was therefore under a lease valid by the laws of Ohio and there is again no reason why all the Ohio decisions as to holding over should not be applicable.

The Lease Did Not Give the United States the Right to Terminate the Tenancy at Will.

There is a remaining point which was not mentioned in the opinion of the Court of Claims, but which was raised by Government counsel in the Court below. They called attention to paragraph 5 of the lease (R. p. 21) which provided:

> "That for and in consideration of the faithful performance of the conditions and stipulations of this agreement, the lessee shall pay to the lessor the sum or sums specified in Condition '1' (a) and (b) hereof, and such other sums for which the lessee may become liable under the provisions of Conditions '2' and '9'; payment to be made at the end of each calendar month, or as soon as practicable thereafter. Should the premises be relinquished before the close of any monthly period, the rental for the last period shall be only the pro rata part of the monthly rental."

The argument was made that the last sentence of this paragraph gave the United States the right to terminate the tenancy at any time and that no rent was due beyond the period of actual occupancy.

However, the plain intention and meaning of Paragraph 5 will not support such an argument. At common law in the absence of any covenant or agreement for apportionment of rent in respect to time it is not apportionable. 16 Ruling Case Law 937. If a tenancy is terminated between the rent days and if the rent does not become due until after the termination it never becomes due.

In the lease in the case at bar the rent was payable "in equal monthly installments in arrears." (Rec. 19) and was to be paid "at the end of each calendar month or as soon as practicable thereafter." (Rec. p. 21.) If therefore the tenancy was terminated before the end of the month—for example, by failure of the landlord's title, constructive eviction, destruction of the property by fire (as contemplated in paragraph 10 of the lease), or other recognized causes for terminating a lease—there would not, in the absence of any agreement, be any liability on the part of the tenant to pay rent for that portion of the month during which he had occupied the premises because the rent would not have become due at the date of termination. The parties therefore inserted the sentence prorating the rent in the paragraph relating solely to payment of rent.

In view of the very clear provision of Paragraph 1 (a), (b), and (c), as to the duration of the lease, a right to cancel at any time at lessee's option cannot be implied from the unambiguous provisions of Paragraph 5, relating only to payment of rent.

"The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended." Sheets v. Seldon, 7 Wallace 416, 423.

Conclusion.

It is therefore urged that the Court of Claims erred in dismissing the plaintiff's petition, and that the writ of certiorari should issue.

Respectfully submitted,

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DEC 31 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 159.

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY, INC.

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No. 159.

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY, INC.

Report of Opinion Below.

The opinion of the Court of Claims (Rec. p. 25) is reported in 62 C. Cls. 370.

Jurisdiction

This case is on certiorari to the Court of Claims under Section 3 (b) of the Act of February 13, 1925,

43 Stat. L. 936, 939. The judgment of the Court of Claims was entered June 14, 1926, sustaining a demurrer and dismissing the petition (R. 27). A motion for new trial was filed July 16, 1926, and was overruled October 25, 1926 (R. 27). The petition for certiorari was filed in this Court January 6, 1927 (R. 28), and the writ was granted April 11, 1927.

Statement of the Case.

This case involves a claim for unpaid rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60 net after certain allowances to the United States. The Court of Claims sustained a demurrer to the petition which set forth the following facts:

The Goodyear Tire & Rubber Company, an Ohio corporation, by lease of October 13, 1921, leased to the United States for the use of the Bureau of War Risk Insurance

> "* * * the following described premises, to have and to hold the same with their appurtenances unto the lessee under the conditions named below, viz:
>
> "(a) The entire first (1st), second (2nd) and third (3rd) floors, * * * in the building located at No. 415 East Sixth Street, in the City of Cincinnati, * * * Ohio. The rent to be paid for the term beginning with date of occupancy and ending June 30, 1926, shall be at the rate of $33,412.83 per annum, payable in equal monthly installments in arrears.
>
> "(b) The entire fourth (4th) floor, * * * in the building located at No. 415 East Sixth Street, in the City of Cincinnati, * * * Ohio. The rent

to be paid for the term beginning April 1, 1922, and ending June 30, 1926, shall be at the rate of $10,739.75 per annum, payabe in equal monthly installments in arrears.

"(c) That it is mutually understood and agreed that in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available, and in such event both parties hereto shall be relieved from obligation hereunder in like manner as if the term of occupancy had run its full period." (R. 19.)

The Veterans Bureau on behalf of the United States took possession of the first, second and third floors of the demised premises October 1, 1921, and took possession of the fourth floor June 1, 1922. They occupied the premises continuously down to December 20, 1923, on which date they vacated the same. (R. 8.)

January 9, 1922, the Goodyear Tire & Rubber Company, the Ohio corporation, subsequent to a reorganization thereof assigned, transferred and set over the lease in question to the Goodyear Tire & Rubber Company, Inc., a Delaware corporation, and the plaintiff in this case.* (R. 8.)

May 1, 1922, a letter was addressed by the Acting Director of the United States Veterans Bureau to the plaintiff, the Goodyear Tire & Rubber Company, Inc.,

*Note: No contention has been made that this violated R. S. 3737 prohibiting the assignment of a contract, and it does not appear that such is the case. See Freedman's Savings & Trust Company v. Shepherd, 127 U. S. 494, Musselman v. United States, 52 C. Cls. 436, holding leases not within section, and Seaboard Air Line v. United States, 256 U. S. 655, indicating reorganization not within companion statute R. S. 3477. See also Empire Refining Co. v. Davis, 6 Fed. (2nd) 305.

and an acknowledgment of the same was made as follows:

"May 1, 1922.

"The Goodyear Tire and Rubber Company, Inc.,
East Market Street, Akron, Ohio.

"Gentlemen: In view of the decision of the Attorney General relating to contracts based on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

"Respectfully, (Sgd.) L. B. Rogers. L. B. Rogers,
Acting Director, U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

"The Goodyear Tire & Rubber Company, Inc.,
Lessor, by G. M. Stadelman, Vice-President.

"Attest: Chas. A. Stillman, Secretary. (Seal of the Goodyear Tire & Rubber Company, Inc.)
"August 15th, 1922." (R. 9.)

The rent for the demised premises was duly paid by the United States down to June 30, 1923. Prior to that date officials of the United States Veterans Bureau notified the plaintiff that the United States would give up occupancy of the demised premises as of June 30, 1923. (R. 9.)

February 13, 1923, a statute had been enacted providing a sufficient appropriation for such rent for the period from June 30, 1923, to June 30, 1924, 42 Stat. L. 1227, 1243.* What followed is thus stated in the plaintiff's petition:

> "When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws* of the State of Ohio by reason of holding over." (R. 10.)

The United States continued in possession until December 20, 1923, and paid rent for the period to December 31, 1923, but has paid no rent for the period from January 1, 1924, to June 30, 1924, the remainder of the fiscal year. The plaintiff made vigorous efforts to rent the premises during that period, but was unable to do so. Allowance is made in the claim, however, for certain building services which the claimant was saved by the non-occupancy. (R. 11.)

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*Note: There had in fact been annual appropriations for the preceding years for which rent had been paid: For the fiscal year ending June 30, 1922, Act of March 4, 1921, 41 Stat. L. 1367, and Act of August 9, 1921, 42 Stat. L. 147. For the fiscal year ending June 30, 1923, Act of June 12, 1922, 42 Stat. L. 635.

*Note: This refers to the decisions. No Ohio statute is directly involved as to the effect of holding over.

In view of the decision in *Leiter v. United States,* 271 U. S. 204, the petitioner abandoned its contention, originally asserted in the Court of Claims, that the United States was bound for the full term to June 30, 1926. The petitioner continued to assert, however, and still contends that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act.

In other words, the petitioner contends:

1. By the Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924. There was therefore on June 30, 1923, authority to lease the property to June 30, 1924. This authority removed any impediment so far as R. S. Secs. 3732 and 3679* as amended were concerned, to the creation of a liability upon the United States *ex contractu* to pay rent if such liability would otherwise follow from acts of the proper officers of the United States.

---

*Note: Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *" And Sec. 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510, provides that: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

2. Under the law of Ohio applicable to the present case the affirmative act of holding over continued the lease for a year, even in spite of the statement by the tenant that it intended to be bound only for a shorter period. The officials of the Veterans' Bureau with authority to obligate the United States by reason of the Appropriation Act, held over into the year for which there was an appropriation, and this act was treated by the plaintiff as creating a tenancy for another year. Under the law of Ohio, these acts of the parties were as effective in creating a tenancy for another year as a duly executed lease would have been. There being no law of the United States to prevent, the United States was therefore bound by the one law applicable —the law of Ohio—to pay the rents for another year.

The Court of Claims, however, ignored the Ohio common law, apparently believing that the United States as a tenant was not subject to the ordinary rules applicable to individuals, and held that the United States was bound only for the period of actual occupancy, for which the rent already had been paid. Judgment was therefore entered for the United States.

Assignment of Errors.

1. The Court of Claims erred in not holding that when the United States had leased real estate in Ohio it was bound by the Ohio common law of landlord and tenant and thus became bound for another year by holding over, where there was statutory authority to bind the United States for such rent by reason of the fact that there was an appropriation available for the payment of the rent for the ensuing year.

2. The Court of Claims erred in not following the Ohio common law that the landlord may treat such a holding over as creating a tenancy for another year in spite of an express statement by the tenant that he does not intend to be bound.

3. The Court of Claims erred in sustaining the demurrer and in dismissing plaintiff's petition.

Argument.

Summary of Argument.

The plaintiff's contention in brief is as follows:

1. The attempted lease by the Veterans' Bureau for five years subject to appropriations each year resulted in a lease for one year with option on the part of the United States to renew. Prior to June 30, 1923, the United States was therefore in possession under an existing lease.

2. As a tenant of Ohio property the United States was subject to the laws of Ohio.

3. Under the common law of Ohio, where rent is reserved annually, and the tenant holds over and states that he intends to be bound for less than a year, but the landlord states that he intends to hold the tenant for another year, the tenant is held for the entire succeeding year.

4. There is nothing in the United States statutes or decisions of the Federal courts which prevents this rule from applying in the present case. In order to hold the United States there need only be (1) author-

ity to bind the United States for the ensuing year, (2) an act by the authorized officers.

5. Prior to June 30, 1923, a sufficient appropriation act had been passed covering the period from June 30, 1923, to June 30, 1924, so that there was authority to bind the United States for rent.

6. It was not necessary that the Government officials enter into an express written contract in order to bind the United States. So long as there was an appropriation available they could bind the United States by doing the thing that the law of Ohio provided would make the tenant liable for another year, that is, by holding over.

7. The Court of Claims has jurisdiction under Section 145 of the Judicial Code.

The Leiter Case Indicates that United States May be Bound by Holding Over.

In the case of *Leiter v. United States*, 271 U. S. 204, there was a lease for five years subject to appropriations as in the case at bar. But in that case *there was no occupation* beyond the fiscal year ending June 30, 1922, and therefore the Government was not held for the ensuing year. The case, however, clearly indicates that had there been occupation into the next year the Government would have been bound. The opinion is in part as follows:

> "A lease to the Government for a term of years when entered into under an appropriation available for but one fiscal year is binding on the Government only for that year. McCollum v. United States, 17 C. Cls., 92, 104; Smoot v. United States,

38 C. Cls. 418, 427. And it is plain that to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that *the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year;* thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. This conclusion is in entire accord with Bradley v. United States, 98 U. S. 104, 114, 115. * * *"

"In the present case, in accordance with the notice of the Veterans' Bureau that it would surrender the premises on June 30, 1922, *the Government did not occupy the premises after that date.* That is, although a lump sum appropriation had meanwhile been made for the rental expenses of the Veterans' Bureau for the next fiscal year—in which no reference was made to these specific leases—*the leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or by the occupation of the premises.* So the Government did not become liable for the payment of rent after the surrender of the premises." (Italics ours.) p. 207, 208.)

It is clear that the Leiter case has a vital difference from the case at bar in that in the case at bar the premises were occupied into another year, whereas in the Leiter case there was no occupation into another year. And it is by reason of this holding over that the claimant contends that the United States became bound in the case at bar. Applying the rule as laid down in the Leiter case to the case at bar we find the following:

The Leiter case states that there must be two elements in order to hold the Government:

1. An appropriation available for the payment of the rent. That existed in the present case. By the

Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924.*

2. The Government by its duly authorized officers must affirmatively continue the lease for such subsequent year. This "affirmative" continuation was done by the holding over into the next fiscal year. The Leiter case does not say that the "affirmative continuation" must be by a written contract. On the contrary the Leiter case calls particular attention to the fact that the premises were not occupied and that "the leases were not continued under this appropriation for the next year either by specific agreement to that effect *or by the occupation of the premises.*" The fair inference from this language is that had there been occupation it would have been considered as an affirmative continuation of the lease if the laws of the state where the property was located so provided.

Earlier Decisions of the Court of Claims Hold That United States May be Bound by Holding Over.

The foregoing view of the Leiter case is supported by the earlier decisions of the Court of Claims on this question.

Note: "That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Executive office and sundry independent executive bureaus, boards, commissions, and offices, for the fiscal year ending June 30, 1924, namely: * * *

United States Veterans Bureau.

For carrying out the provisions of an Act entitled 'An Act to establish a Veterans Bureau and to improve the facilities and service of such bureau and to further amend and modify the War Risk Insurance Act approved August 9, 1921,' including salaries and expenses of the central office at Washington, District of Columbia, and regional offices and sub-offices, and including * * * rentals * * * $49,984,063."

In *McCollum v. United States,* 17 C. Cls. 92, that Court in the following language stated that the United States might become bound to pay rent for another year by staying in possession after the expiration of its lease:

> "So far, therefore, as the contract relates to that fiscal year it was lawfully made and was binding on the defendants. Beyond that its only force was to give the Postmaster General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the year. *If he should occupy the premises after the beginning of the new year, he might be held to have renewed the obligation on the part of the defendants for that one year."* (Italics ours.) (p. 104.)

The case of *Smoot v. United States,* 38 C. Cls. 418, is a direct authority for the proposition that a lease may be "affirmatively continued" for another year by the United States as lessee simply by virtue of the fact that the United States remains in possession of the premises into the next fiscal year. There an attempt was made to create a lease for five years when there was an appropriation only for one year. The court held the effect of the lease, plus occupation thereunder, created a tenancy to the end of the first fiscal year, with an option in the United States to renew for each succeeding year in the event that there was an adequate appropriation. *The United States remained in possession up to and after the end of the third fiscal year, and vacated the premises in the middle of the fourth fiscal year just as in the case at bar.* The Court

of Claims held that by remaining in possession into the fourth fiscal year the United States became liable for rent to the end of that fiscal year, although it only occupied the premises half of the year, *and the plaintiff was given a judgment for the rent for the remainder of the year, including the part thereof that the building was not occupied.**

The case of *Connecticut Mutual Life Insurance Company v. United States*, 21 C. Cls. 195, is another case in which the United States was held liable as a tenant for another year's rent because the United States remained in possession of the premises after the expiration of its lease. There the lease expired June 30, 1878, the end of the fiscal year. The United States, however, remained in possession until January, 1879. The court held that by so doing it became liable for rent to the end of the fiscal year ending June 30, 1879, although the tenant had occupied only for part of the fiscal year. The court clearly recognized that there might be a tenancy created under the State law without an express agreement, saying:

> "*From this state of facts springs* the relation of landlord and tenant under a lease from year to year." (p. 199)

The foregoing cases demonstrate, as indicated by the Leiter case, that no express written renewal of a lease is necessary, but that a situation may be created by agents of the United States holding into part of another fiscal year whereby the United States becomes bound for rent for that entire fiscal year. In other

*Note: It was held that the use of one room by a deputy marshal into the *next* year might have been for his personal purposes and was not an authorized occupancy by the United States, and there being no other occupancy the United States was not held for rent beyond the current fiscal year.

words, *the holding into the next year* may be the "affirmative act" referred to in the Leiter case, which in addition to an appropriation is all that is necessary to bind the United States.

Law of Ohio Should Be Applied.

This Court in the case of *United States v. Bostwick*, 94 U. S. 53, involving a question of landlord and tenant law, said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them." (p. 66)

In *Clifford v. United States*, 34 C. Cls. 223, the Court of Claims held:

> "* * * When it (the United States) goes into State territory to acquire an estate or right in or to real property by purchase, the law of the State controls and regulates the rights and liabilities of the contracting parties." (p. 232)

This was a case involving the New York law. The Court of Claims held the United States because under the decisions of the courts of the State of New York *where the property was located*, an individual would have been held in a similar case.

In *Connecticut Mutual Life v. United States*, 21 C. Cls. 195, heretofore discussed, the Court was most careful to apply the Illinois law, citing Illinois statutes and cases (page 199). To the same effect as applying

the local law are *Spoffard v. United States,* 32 C. Cls. 452, 457, and *Blair v. United States,* 53 C. Cls. 457.

Under the Ohio Law a Tenancy for Another Year was Created from the Fact of Holding Over.

In the petitioner's brief accompanying its petition for certiorari the construction of the lease and the decisions of Ohio applicable to the holding over were fully discussed. (See prior brief, pages 14 to 19.) In the brief for the Government in opposition, however, appears the following statement at page 8:

> "Assuming that the case is to be governed by the law of Ohio and that the United States is in the same position as a private corporation would be under like circumstances, we would have no ground to contend that by holding over after the expiration of the one year term ending June 30, 1923, the United States did not by virtue of the election of the landlord become obligated for a term of one year ending June 30, 1923. * * *"

In view of this admission we shall not repeat the argument on this point contained in the prior brief.

The Court of Claims had Jurisdiction.

In its brief in opposition to the petition for certiorari the Government raised a question regarding the jurisdiction of the Court of Claims, contending that the obligation of the United States did not arise from a con-

tract express or implied in fact and was not enforceable in the Court of Claims.*

The jurisdictional statute is as follows:

> "Judicial Code: Sec. 145. (*Jurisdiction.*) The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. (*Claims against the United States.*) All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

Of this statute it was said in *United States v. Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 32, that it was an

> "inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

There can be no question that were the United States suable, they would be liable for rent for the full year July 1, 1923, to June 30, 1924. The Government did not deny this.

It is also true that the Court of Claims has exercised unquestioned jurisdiction for more than forty-five

*Note: The Court of Claims did not give this as a reason for its decision.

years to enter judgments for rent against the United States under tenancies originally created by express leases and continued by holding over in possession of premises into a new period.

Such a judgment was entered in *Connecticut Mutual Life Insurance Co. v. United States*, 21 C. Cls. 195. In that case, as in this the United States remained in possession of the premises. The Court of Claims said:

> "From this state of facts springs the relation of landlord and tenant under a lease from year to year."

See also *McCollum v. United States*, 17 C. Cls. 92; *Smoot v. United States*, 38 C. Cls. 418. And in *Leiter v. United States*, 271 U. S. 204, this Court clearly indicated that the obligations of the United States under a lease from year to year could be continued "either by a specific agreement to that effect or by the occupation of the premises."

It is clear, then, that the fact that a tenancy has been continued by the conduct of the Government in holding over does not make an action for rent beyond the jurisdiction of the Court of Claims. Such actions are "founded" on the original lease, otherwise there would be no tenancy. But the duration of the tenancy is determined by the law. In such cases when the Government holds over it acquiesces in the continuance of the relation of landlord and tenant into which it has expressly entered. Once continued, that relationship remains in existence for the period fixed by the law of the situs. It may be a month, or it may be a year, or the landlord may terminate it at will, whatever the local law provides.

The present case is equally one "founded" upon the

original lease. The United States continued, as it had a right to do, in possession as a tenant. It sought to limit the duration of the tenancy to its own will. This, under the law, it could not do over the objection of the plaintiff. The duration of the tenancy, fixed by law, in such a case was one year unless a less period was agreed upon. None was. Therefore, the United States continued as tenant under the terms, conditions and obligations of the original lease for one year.

Hence, the present case is founded upon the original lease and within the jurisdiction of the Court of Claims.

The fact that the Government stated that it expected to incur obligation as a tenant during its own pleasure, we have already stated, had no legal effect in affecting the term of the tenancy. It may be pointed out that in the case of *Leiter v. United States*, 271 U. S. 204, the fact that the United States stated in the contract that the tenancy was to continue for five years subject to appropriations did not affect the duration. In that case no tenancy for *more* than a year with option in the United States to renew could legally be created. In the present case no tenancy for *less* than a year could legally be created over the protest of the plaintiff.

Every lease has some incidents which are determined by law but this does not prevent suit thereon against the United States. In *Bostwick v. United States*, 94 U. S. 53, suit was brought on a contract which was held equivalent to a lease. Claim was made for the destruction of trees and fences and for the digging and carrying away of stone. This was not expressly covered by the lease, and the Court said:

"The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. * * * (66).

"* * * But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract for which the United States consent to be sued in the Court of Claims. * * * This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action." (69)

When the lease was first entered into between Goodyear and the United States, one of its obligations was that if the United States, having an adequate authority, held over, the lease would be continued, at the plaintiff's option, for another year. The Ohio law made that a part of the lease just as the provision against waste became a part of the lease in the Bostwick case. The obligation arose because the United States entered into the contract of lease. Therefore, this suit is "founded" upon the lease, and thus on an express contract within the jurisdictional statute.

There is, however, an entirely distinct basis for jurisdiction in the case at bar. In addition to the jurisdiction over "Claims * * * upon any contract, express or implied," the statute provides for jurisdiction over

"all claims * * * for damages, liquidated or unliquidated, in cases not sounding in tort, in respect

> of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

This jurisdiction has been held to be distinct. *Dooley v. United States,* 182 U. S. 222, 223; *United States v. Lynah,* 188 U. S. 445, 475. The possibility that an action may be sustained *either* as an action founded upon a contract *or* as an action for damages not sounding in tort has been expressly pointed out in *Juragua Iron Company v. United States,* 212 U. S. 297, 302, where the Court said:

> "Manifestly, no action can be maintained under this statute unless the United States became bound by implied contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one '*not* sounding in *tort*'."

Also in *United States v. Cornell Steamboat Company,* 202 U. S. 184, 190, it was held that the claim in question was not founded upon a contract, express or implied, but the Court said:

> "But the claim may properly be said to be one for unliquidated damages in a case 'not sounding in tort' in respect of which the party would be entitled to redress in a court of admiralty if the United States were suable."

Therefore even the contention of the Government that the present case is not founded upon contract, express or implied, is fruitless if the claim falls within the remaining provisions of the statute just quoted. The jurisdiction under this portion of the statute can hardly be doubted.

It has been admitted that this is a case where "the party would be entitled to redress against the United States * * * in a court of law * * * if the United States were suable." It is a claim for damages. By the express terms of the statute therefore the Court of Claims has jurisdiction unless it is a case sounding in tort.*

It is obvious that this is not a case sounding in tort. No tort or wrong has been done the plaintiff company by any Government official. The plaintiff company was willing to have the Government remain in possession into the new term. Officials of the plaintiff company contended that under their construction of the lease it ran throughout the ensuing year and in fact up to June 30, 1926, but they stated that if this construction was incorrect they would consider that the Government would be bound for the ensuing year under the Ohio law relating to holding over. The plaintiff having announced this position prior to July 1, 1923, there was no moment that the Government was tortiously remaining on the plaintiff's property. The Government was always there by permission of the plaintiff, and there is no tort in the case.

The cases cited in the Government's brief in opposition to the petition for certiorari can readily be distinguished: In two this Court expressly said that the claim sounded in tort: *Temple v. United States*, 248 U. S. 121, (claim for real estate taken in dredging operation where Government had claimed title); *Ball*

Note: The distinction between contract and tort cannot be evaded and jurisdiction obtained by framing a claim sounding in tort as upon an implied contract or upon equitable considerations. Gibbons v. United States, 8 Wall. 269, 274; Hill v. United States, 149 U. S. 593, 598; United States v. Minnesota Investment Co., 271 U. S. 212, 218.

On the other hand, jurisdiction will not be lost because a claim may be called a contract implied in law if it is not sounding in tort: Clark v. United States, 95 U. S. 539; Crocker v. United States, 240 U. S. 74; Freund v. United States, 260 U. S. 60.

Engineering Co. v. White & Co., 250 U. S. 46 (claim for equipment which Government officials took claiming right to do so under contract with a third party). In *Horstman Co. v. United States,* 257 U. S. 138, where an irrigation project had injured the claimant's property by percolating waters it was held that the Government did not "intend a taking by that which no human knowledge could even predict." In *Klebe v. United States,* 263 U. S. 188, recovery for the value of a steam shovel was denied because this Court found that it had been taken under claim of right pursuant to an express contract, so that the terms of the express contract governed, or else the claim sounded in tort.

The jurisdiction in the case at bar can therefore be sustained as upon a claim for damages not sounding in tort.

Conclusion.

In conclusion we respectfully refer again to the case with which we commenced our argument, the recent decision of this Court in *Leiter v. United States,* 271 U. S. 204, from which the inference seems to be clear that a prior appropriation plus an occupation of the premises will make the Government liable for another year, and in which no doubt of the jurisdiction is expressed.

It is therefore prayed that the decision of the Court of Claims be reversed and the case remanded with instructions to overrule the demurrer to the petition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 159.

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY, INC.

The Court of Claims Has Jurisdiction.

The only question raised by the United States is as to the jurisdiction of the Court.

The petitioner contends that there is jurisdiction under Section 145 of the Judicial Code, *either*

(1) As upon a claim founded upon a contract, express or implied, with the Government of the United States, *or*

(2) As upon a claim for damages in a case not sounding in tort in respect of which claim the party would be entitled to redress against the United States in a court of law if the United States were suable.

The United States contends that it is not liable upon implied contracts, except those implied in fact, and that the liability for the additional year's rent is one imposed by law. (See Government brief, page 6.)

The United States further suggests that it is not liable for penalties imposed for tortious acts, and that this is such. (Page 15.)

It is significant that the United States does not cite the jurisdictional statute. Nor does it rely upon any cases like the one at bar. It bases its argument solely on a line of cases where on the special facts recovery was not allowed on contracts implied in law.

The error in the Government's argument is the assumption that recovery is absolutely precluded if a case involves a contract implied in law even though it may be a claim for damages in a case not sounding in tort. This cannot be so because of the decisions of this court in Freund v. United States, 260 U. S. 60; *and Clark v. United States,* 95 U. S. 539; *and the dictum in Crocker v. United States* 240 U. S. 74.

In *Freund v. United States,* 260 U. S. 60, there had been an express contract to carry mail in St. Louis. The Post Office Department, relying on certain clauses in the contract, substituted another route and ordered the contractors to begin performance at what the Department held to be the same rate per mile of service. The contractors protested, but threatened with suit upon their bond, performed the service and accepted periodical payments. They then entered suit.

> "The contractors' claim was that the substitution of the new route for the one they bid on was not within the terms of the contract, but was unconscionable, and that they were entitled to recover for the work done on the new route on a *quantum meruit*." (62)

It will be observed that Government officials had expressly stated that they would pay only what the contract called for. According to the contention of the Government counsel in the case at bar, this could not have resulted in a contract implied in fact, to pay the value of the services rendered, the claim on a *quantum meruit* basis must have been on a contract implied at law, and therefore it should have been held that the Court of Claims had no jurisdiction. But this Court did *not* so hold. The Court said:

> "We think that the contractors are entitled to recover the reasonable value of their services for the sixteen months, including a fair profit."

And the case was remanded to the Court of Claims with directions to find the value of the services rendered on the substituted route including a fair profit, and to enter judgment for the balance found due.

In *Clark v. United States*, 95 U. S. 539, suit was brought on on oral contract to pay rental for a steamer at $150 per day and if she were lost to pay whatever three disinterested men should estimate her value to be. The vessel was wrecked and the three disinterested men found her value to be $60,000. She had been in the service of the Government for eight days. It was held that there could be no recovery on the contract as such because it was not in writing and that there could be no recovery for the loss of the vessel. But it was

held that the claimant could recover the value of the vessel "as upon an implied contract" for a *quantum meruit*. The rental fixed in the parole contract was taken as *evidence* of the value, and the claimant was allowed recovery at $150 per day. It will be noted that the court here allowed recovery in implied contract, and it must have been a contract implied in law and not in fact *because the amount found due was entirely different from the intention of the Government officers.* The *fact* was that the Government officials intended to pay a flat rate of $150 per day (not whatever the value of the use of the vessel was), plus the value of the vessel as found by three disinterested men if the vessel were lost. The Government officials did *not* intend to pay the value of the use of the vessel (whatever it might turn out to be) without any payment for its loss. There were no facts on which such an agreement could be found and they had expressly agreed to pay on a different basis. The court clearly found a contract implied at law when recovery for the value of the use of the vessel was allowed in *quantum meruit.*

The *Clark* case was followed in *Crocker v. United States,* 240 U. S. 74, where it was stated that although there could be no recovery on an express contract for the sale of satchels to the Post Office Department because it was tainted with fraud and had been rescinded by the Postmaster General on that ground, there might have been a recovery upon a *quantum valebat* for the satchels actually furnished had evidence been introduced of their value. This would evidently have been a contract implied in law, for it would have been on a basis different from the express intentions of the Government officials.

It is clear from these three cases that the mere fact

that the Government officials stated in the case at bar that they would not be bound for a year would not prevent liability from arising by their act of holding over, and it is further evident that this court has given judgments in cases where it could be said that the obligation of the United States was implied in law rather than in fact.

Analysis of the cases cited on page 8 of the Government's brief as authorities for the contention that there is no jurisdiction if a contract implied in law is involved will show that in each case recovery was allowed on the facts or there was some good reason why the claim could not be allowed as an action in damages not sounding in tort:

Case was sounding in tort: *Temple v. United States,* 248 U. S. 121; *Ball Engineering Co. v. White,* 250 U. S. 46; *Horstman Co. v. United States,* 257 U. S. 138; *United States v. Minnesota Co.,* 271 U. S. 212 (claimant also failed to show United States under any obligation to pay interest); *Livingston v. United States,* 273 U. S. 648.

No authority in officials to bind United States: *Sutton v. United States,* 256 U. S. 575; *Baltimore & Ohio v. United States,* 261 U. S. 592.

Express contract precluded recovery: *Klebe v. United States,* 263 U. S. 188.

No showing repayment not compelled by Government under Section 1 of Dent Act: *Merritt v. United States,* 267 U. S. 338.

Recovery allowed on facts: *United States v. Buffalo Pitts Company,* 234 U. S. 228; *United States v. North American Transportation & Trading Co.,* 253 U. S. 330.

Probably the strongest case from the standpoint of the Government is *United States v. Minnesota Investment Co.*, 271 U. S. 212. In that case recovery was sought on equitable considerations because interest on a fund deposited in court by the claimant had been paid to the United States by the bank where it had been placed. But in that case if the claimant was to recover it must have been on the theory of a constructive trust, and in such cases where a trustee diverts funds, the *cestui* may, when the claim arises, elect to treat him either as a debtor or a trespasser, 39 Cyc. 533. The case therefore "sounded in tort."

From the *Freund, Clark*, and *Crocker* cases and from the cases cited by the Government, we believe that the true rule is that the fact that a claim may have aspects of a contract implied in law will not preclude recovery if it is a claim under the last branch of Section 145 of the Judicial Code, for damages in a case not sounding in tort in respect of which the party would be entitled to redress against the United States in a court of law if the United States were suable.*

It remains to determine whether this is a case "sounding in tort."

The Government does not argue this point at length but cites a New York case (page 15), which states that the right to hold the tenant is the penalty imposed by law upon the trespassing tenant. The Government's brief then says, "Of course the United States is not liable for penalties imposed for tortious acts."

In the case cited, *U. M. Realty & Imp. Co. v. Roth*, 193 N. Y. 570, there was a *silent* holding over. To

*This is all in addition to the argument contained on pages 16 to 19 of the petitioner's original brief that this is essentially a suit "founded upon" an express contract, to wit, the lease.

call this "sounding in tort" would appear to be inconsistent with the many cases where the Court of Claims has held the United States on silent holdings over (see petitioner's original brief, pages 11 to 14), for if those cases had been "sounding in tort" they would have been dismissed according to the Government's theory.

In the case at bar no actual tort was involved (see petitioner's original brief, page 21). The action would have been in debt or in *indebitatus assumpsit* (see Tiffany, Landlord and Tenant, Vol. II, pp. 1818, 1824), neither of which are now considered tort actions, Shipman, Handbook on Common Law Pleading, 2d Ed., p. 9.

The Government does not appear to deny this, but contends that the *historical basis* of the liability is in tort. This, however, clearly is not the meaning of the statute. If the words "sounding in tort" precluded recovery in all cases where the liability was historically originally based on tort, no recovery would have been allowed in the *Freund, Clark and Crocker* cases heretofore discussed in this reply brief, since, though not founded upon contracts express or implied in fact, they were essentially assumpsit actions which *historically* were torts, although not in any sense torts at the present time or at the time of the passage of the Tucker Act of 1887. (See Shipman, Handbook of Common Law Pleading, 2d Ed., p. 9.)

From the decisions in these cases it appears that the words "sounding in tort" refer not to the ancient historical basis of the action but to the sort of action that would have been brought against an individual at the time of the passage of the Tucker Act. In the case at bar, as has been pointed out, the action would

not have been in tort but would have been in debt or assumpsit.

It is the claimant's contention that if a tort action could have been brought against an individual, recovery cannot be had by framing the case in implied contract, but if no tort action could have been brought (whatever the ancient history of the liability may be) there may be recovery where recovery could have been had against an individual.

As a matter of fact it is very doubtful whether it is correct to say that the historical basis of the liability is tortious in the case at bar. In Blackstone's Commentaries, Book 2, p. 150, occurs the following:

> "An estate at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. * * * This estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful."

And Tiedeman in Real Property, 2 ed. 189 says,

> "The tenant, however, is not a trespasser unless he attempts to retain possession after entry by the owner."

There was no entry in the present case, so that, even historically considered, the holding over never became tortious.

It is therefore urged that the Court had jurisdiction, and it is prayed that the decision of the Court of Claims be reversed and the case remanded with instructions to overrule the demurrer to the petition.

Respectfully submitted,

J. Harry Covington,
Spencer Gordon,
Dean Acheson,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., petitioner

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 14, 1926. (R. 27.) The petitioner filed a motion for a new trial on July 16, 1926, which motion was overruled by the court on October 25, 1926 (R. 27), and the petition for certiorari was filed January 6, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939).

THE QUESTION PRESENTED

The question involved is, Shall the United States be held liable for rent from January 1, 1924, to June 30, 1924, under a lease for four floors of a building located in Ohio, entered into on October 13, 1921, renewed for a term of one year ending June 30, 1923, when, prior to June 30, 1923, it notified the lessor that it would give up the occupancy of the premises as of June 30, 1923, but when June 30, 1923, arrived, the United States still desired to occupy the premises for a while, and so advised the lessor, expressly stating to the lessor at that time that there was no intention on its part to pay rent for any longer time than the actual period of occupancy, and, further, that it did not intend to renew the lease for the next fiscal year, although it continued in possession until December 20, 1923, and paid the rent reserved up to December 31, 1923?

STATEMENT

This case involves a claim for rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60. The Court of Claims sustained a demurrer to the petition.

The petition shows that the Goodyear Tire & Rubber Company, an Ohio corporation, by a lease consummated October 13, 1921, leased to the United States, for the use of the Bureau of War Risk Insurance, certain premises in the city of Cincinnati, Ohio, for a term beginning September 1, 1921, and

ending June 30, 1926, at an annual rental of $33,412.83, and some additional premises for the term from April 1, 1922, to June 30, 1926, at an annual rental of $10,739.75. (R. 6 et seq.) The lease contained the provision (R. 7):

> In the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available.

The Veterans' Bureau, on behalf of the United States, took possession of the leased premises pursuant to this lease. Annually, for fiscal years down to the year ending June 30, 1924, appropriations were made out of which the rent could be paid. (R. 8.) The lease is treated as a lease for the fiscal year in which it was made, with an option to the United States to renew for each fiscal year during the term stated in case appropriations became available.

The Veterans' Bureau remained in possession, and on May 1, 1922, on the theory that the lease was renewable by the United States each fiscal year, the following letter was written by the Veterans' Bureau to the lessor (R. 9):

> MAY 1, 1922.
>
> THE GOODYEAR TIRE AND
> RUBBER COMPANY, INC.,
> *East Market Street, Akron, Ohio.*
>
> GENTLEMEN: In view of the decision of the Attorney General relating to contracts based

on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third, and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

Respectfully,

(Sgd.) L. B. ROGERS,
Acting Director U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

THE GOODYEAR TIRE &
RUBBER COMPANY, INC., *Lessor,*
By G. M. STADELMAN, *Vice President.*

The rent was regularly paid down to June 30, 1923, so that the lease, by virtue of the last renewal, became a lease for a term of one year ending June 30, 1923.

Prior to June 30, 1923, officials of the Veterans' Bureau informed the landlord that the United States would give up occupancy of the premises as of June 30, 1923. It was contended by the Veterans' Bureau that the lease did not extend beyond June 30, 1923, on the theory that there was no authority in the Director of the Veterans' Bureau

to make a lease for more than one fiscal year under the provisions of Section 3679 of the Revised Statutes, as amended by the Act of March 3, 1905 (c. 1484, 33 Stat. 1214, 1257), and by the Act of February 27, 1906 (c. 510, 34 Stat. 27, 48), which provides that—

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *

See *Leiter* v. *United States,* 271 U. S. 204, 207.

The landlord contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not occurred.

When June 30, 1923, arrived the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year. The officials of the Bureau stated, by way of explanation of their holding over, that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the landlord, on the other hand, claimed that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained

in possession longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the law in force in the State of Ohio, as the result of holding over after the expiration of the term. (R. 10.)

The United States remained in possession to December 20, 1923, and vacated the premises on that date, but paid rent at the specified rate to December 31, 1923. The landlord presented a claim for rent for the balance of the period to June 30, 1926, but that claim was rejected and has been abandoned because of the decision in *Leiter* v. *United States, supra,* which disposes of the claim.

This suit is for rent for the period from December 31, 1923, to the end of that fiscal year, June 30, 1924, on the theory that by virtue of the renewal, the lease became one for a term of one year ending June 30, 1923, and by holding over the United States became a tenant for an additional year, and because the landlord was unable to find any other tenant for the period from December 31, 1923, to June 30, 1924.

ARGUMENT

This lease covered premises in the State of Ohio, and, applying the law of the State of Ohio, as announced by the courts of that State, it would follow that a tenant for a term of one year holding over after the expiration of his term, without a new agreement, might be treated by the landlord either as a tenant at sufferance or as a tenant from year to year, and this, without regard to the desires or

intention of the tenant, and irrespective of the fact that the tenant before holding over declared to the landlord that he would only be bound for such length of time as he remained in possession.

There is no statute in the State of Ohio modifying the common law applicable to a situation where the lessee holds after the expiration of a definite term, and the law of Ohio is to be found in the common law as announced by the courts of that State. The courts of that State have said:

> A tenant in possession under a lease, who holds over after the termination of the time for which the premises were let to him, without any new demise, may be treated either as a tenant at sufferance or as a tenant from year to year. If the landlord sees fit to require his immediate removal, he may do so, treating him as a tenant at sufferance; or the landlord may treat him as a tenant from year to year, and require the payment of rent for a yearly period. The intention of the tenant is immaterial, even if the landlord knows of such intention. (Supp. Page's Ohio Digest, Vol. 3, column 5963.)

Long v. *Kahn,* 19 Ohio Nisi Prius (N. S.) 1; *Kahn* v. *Long,* 95 Ohio State 344; *Walker* v. *Bumiller,* 25 Ohio Circuit Court (N. S.) 385; *Strong* v. *Schmidt,* 15 Ohio Circuit Court, 233.

The Ohio court seems to have followed the decision of the Supreme Court of New York in *Conway* v. *Starkweather,* 1 Denio, 113.

Assuming that the case is to be governed by the law of Ohio, and that the United States is in the same position as a private corporation would be under like circumstances, we would have no ground to contend that by holding over after the expiration of the one-year term ending June 30, 1923, the United States did not, by virtue of the election of the landlord, become obligated for a term of one year ending June 30, 1924, but there is another point in the case which may be advanced to support the judgment of the Court of Claims.

The Act relied on to give the Court of Claims jurisdiction of a suit against the United States on this claim gives jurisdiction in cases of contract express or implied. There was no express contract in this case binding the United States to pay rent for the full year ending June 30, 1924. On the contrary, the United States, at the time of the expiration of the original term, expressly rejected the proposition that it would become liable for the additional term of one year. The question remains whether there was an implied contract within the meaning of the jurisdictional statute relating to the Court of Claims. This Court has often said that an implied contract, under this jurisdictional statute, must be one implied in fact and not by operation of law. *Tempel* v. *United States,* 248 U. S. 121; *Ball Engineering Co.* v. *White & Company,* 250 U. S. 46, 57; *Horstmann Co.* v. *United States,* 257 U .S. 138, 146; *Klebe* v. *United States,* 263 U. S., 188, 192.

The question left is whether the obligation imposed on the tenant holding over, by the technical rule of the law of landlord and tenant above referred to, and in the face of an affirmative declaration by the tenant that it would only be bound for the period it remained in possession, results from a contract implied in fact.

If the tenant holds over after the expiration of his term without anything being said by him or his landlord respecting the nature of the resulting obligation, a contract for the additional term may be one implied in fact, on the theory that the situation and conduct of the parties shows a real intention that the tenant shall become a tenant for an additional term of one year; but this can not be so where the tenant at or before the time when their holding over commences, expressly declares to his landlord that he intends to be bound only for the length of time he remains in possession. The theory of the rule making the tenant liable at the option of the landlord for an additional term of one year, nothwithstanding the tenant has protested in advance, he will not be so liable, has been dealt with in *Tiffany,* Landlord and Tenant, Vol. 2, p. 1472, where it is said:

> It has been suggested that this option in the landlord is to be regarded as based on the theory that the tenant holding over presumably intends to hold for another term or period, and that he can not overthrow this presumption by asserting, to the disadvan-

> tage of the landlord, that he is holding as a wrongdoer. There seems, however, no advantage in introducing such a theory, and it is more satisfactory to regard this as "one among the cases where a person may be charged, as upon a contract, without his consent, and contrary to his intention." In other words, the tenant is liable for further rent upon the principle, not of contract, but of *quasi* contract. That this is the character of the liability plainly appears from the fact that it exists in spite of any statements by the tenant evidencing a contrary intention.

See *Clinton Wire Cloth Co.* v. *Gardner,* 99 Ill. 151.

In *Herter* v. *Mullen,* 159 N. Y. 28, it was said:

> The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as the duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law, and in no sense upon an express or absolute contract.

Having in mind the foundation for the obligation imposed by the law of landlord and tenant in such cases and that this Court has consistently held that, under the Act granting jurisdiction to the Court of Claims, a contract implied must be one

implied in fact from circumstances from which the intention of the United States to pay may be presumed, there is substantial ground to support the judgment of the Court of Claims, because of the fact that in this case the intention of the United States not to pay beyond the time it remained in possession was clearly and plainly expressed. No doubt the Court of Claims had this point in mind in disposing of the case in the way it did.

Without pursuing the subject further, it may be said that this case involves no principle of any general importance. The law of landlord and tenant in the State of Ohio is not a subject inviting attention from this Court. In most States of the Union statutes have been enacted which would prevent any such question as is here presented from arising in cases of leases to the United States and which prescribe that in case of a holding over, where the creation of tenancy at will has resulted, notice to quit is sufficient if given for thirty or sixty days. See *Leavitt* v. *Maykel,* 203 Mass. 506, 509.

In this case the landlord has been paid for somewhat more than the length of time the United States remained in possession. It had notice of the position of the United States as early as June 30, 1923. It knew then that the United States intended to pay only for the time it remained in possession. Admittedly, under the law of Ohio, the landlord then could have elected to treat the United States as a tenant at sufferance and required it to

immediately remove. Instead, it chose to allow the United States to remain. The landlord took its chances on being able to hold the United States for the full year. It was no doubt glad to have the United States remain as long as it did.

Under all the circumstances, there is substantial ground for supporting the judgment of the Court of Claims. There is no reason to believe that justice has not been done, and the case is not of such a nature as to justify consideration from this Court, and the petition for certiorari should be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
JAMES J. LENIHAN,
JOHN E. HOOVER,
Attorneys.

MARCH, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 159

THE GOODYEAR TIRE & RUBBER COMPANY, INC., petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 25) is reported, 62 Ct. Cls. 370.

JURISDICTION

The judgment of the Court of Claims was entered June 14, 1926. (R 27.) The petitioner filed a motion for a new trial on July 16, 1926, which motion was overruled by the court on October 25, 1926. (R. 27.) The petition for certiorari was

filed January 6, 1927, and granted April 11, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question involved is, Shall the United States be held liable for rent from January 1, 1924, to June 30, 1924, under a lease for four floors of a building located in Ohio, entered into on October 13, 1921, renewed for a term of one year ending June 30, 1923, when, prior to June 30, 1923, it notified the lessor that it would give up the occupancy of the premises as of June 30, 1923, but when June 30, 1923, arrived, the United States still desired to occupy the premises for a while, and so advised the lessor, expressly stating to the lessor at that time that there was no intention on its part to pay rent for any longer time than the actual period of occupancy, and, further, that it did not intend to renew the lease for the next fiscal year, although it continued in possession until December 20, 1923, and paid the rent reserved up to December 31, 1923?

STATEMENT

This case involves a claim for rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60. The Court of Claims sustained a demurrer to the petition.

The petition shows that the Goodyear Tire & Rubber Company, an Ohio corporation, by a lease

consummated October 13, 1921, leased to the United States, for the use of the Bureau of War Risk Insurance, certain premises in the city of Cincinnati, Ohio, for a term beginning September 1, 1921, and ending June 30, 1926, at an annual rental of $33,412.83, and some additional premises for the term from April 1, 1922, to June 30, 1926, at an annual rental of $10,739.75. (R. 6 et seq.) The lease contained the provision (R. 7):

> in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available.

The Veterans' Bureau, on behalf of the United States, took possession of the leased premises pursuant to this lease. Annually, for fiscal years down to the year ending June 30, 1924, appropriations were made out of which the rent could be paid. (R. 8.) The lease is treated as a lease for the fiscal year in which it was made, with an option to the United States to renew for each fiscal year during the term stated in case appropriations became available.

The Veterans' Bureau remained in possession, and on May 1, 1922, on the theory that the lease was renewable by the United States each fiscal year, the following letter was written by the Veterans' Bureau to the lessor (R. 9):

MAY 1, 1922.

THE GOODYEAR TIRE AND
RUBBER COMPANY, INC.,
East Market Street, Akron, Ohio.

GENTLEMEN: In view of the decision of the Attorney General relating to contracts based on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third, and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

Respectfully,

(Sgd.) L. B. ROGERS,
Acting Director U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

THE GOODYEAR TIRE &
RUBBER COMPANY, INC., *Lessor,*
By G. M. STADELMAN, *Vice President.*

The rent was regularly paid down to June 30, 1923, so that the lease, by virtue of the last renewal, became a lease for a term of one year ending June 30, 1923. (R. 9.)

Prior to June 30, 1923, officials of the Veterans' Bureau informed the landlord that the United

States would give up occupancy of the premises as of June 30, 1923. (R. 9.) It was contended by the Veterans' Bureau that the lease did not extend beyond June 30, 1923, on the theory that there was no authority in the Director of the Veterans' Bureau to make a lease for more than one fiscal year under the provisions of Section 3679 of the Revised Statutes, as amended by the Act of March 3, 1905, c. 1484, 33 Stat. 1214, 1257, and by the Act of February 27, 1906, c. 510, 34 Stat. 27, 49 (U. S. C., Title 31, Sec. 665), which provides that:

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *

See *Leiter* v. *United States,* 271 U. S. 204, 207.

The landlord contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not occurred. (R. 10.)

When June 30, 1923, arrived the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year. (R. 10.) The officials of the Bureau then stated that there was no intention on the part of the United States to pay rent for any longer time than the actual

period of occupancy, and the landlord, on the other hand, stated that it was its contention that the term of the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained in possession longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the law in force in the State of Ohio, as the result of holding over after the expiration of the term. (R. 10.)

The United States remained in possession to December 20, 1923, and vacated the premises on that date but paid rent at the specified rate to December 31, 1923. (R. 10.) The landlord abandoned its claim for rent to June 30, 1926, because of the decision in *Leiter* v. *United States,* 271 U. S. 204, but claimed rent to June 30, 1924, which claim was rejected by the Comptroller General, 5 Dec. Compt. Gen., 172. This suit was thereupon brought on the theory that by holding over after June 30, 1923, the United States became liable for rent as a tenant for an additional year.

THE CONTENTION OF THE UNITED STATES

The United States claims that it is not liable upon implied contracts, except those implied in fact, and that the liability for an additional year's rent imposed by law upon the tenant holding over is not of that character.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE UPON IMPLIED CONTRACTS, EXCEPT THOSE IMPLIED IN FACT

The lease terminated on June 30, 1923. *Leiter* v. *United States,* 271 U. S. 204. In that case this Court said, at page 207:

> A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. *McCollum* v. *United States,* 17 Ct. Cls. 92, 104; *Smoot* v. *United States,* 38 Ct. Cls. 418, 427. And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.

Prior to that date the Veterans' Bureau notified the landlord that the United States would give up occupancy of the premises as of June 30, 1923, thus plainly showing that there was no intention to renew the lease. Assuming the law of Ohio to be that, under the circumstances, a privatae corporation holding over would be held liable for a year's

rent, no such liability can be inferred against the United States. Such liabilities do not arise from contracts implied in fact but from contracts implied in law, or such as are now more generally called *quasi* contracts. For such liabilities the United States has never consented to be sued and no court has jurisdiction to render a judgment founded thereon.

This principle has been affirmed and reaffirmed so many times and applied to so many varying states of fact that it is no longer open to question.

United States v. *North American Company*, 253 U. S. 330.

United States v. *Buffalo Pitts Co.*, 234 U. S. 228.

Tempel v. *United States*, 248 U. S. 121.

Ball Engineering Company v. *White & Co.*, 250 U. S. 46.

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Merritt v. *United States*, 267 U. S. 338.

United States v. *Minn. Investment Co.*, 271 U. S. 212.

Livingston v. *United States*, 273 U. S. 648.

See also dissenting opinion of Mr. Justice Brandeis in *Portsmouth Company* v. *United States*, 260 U. S. 327, 330.

Thus in *United States* v. *Minn. Investment Co.*, 271 U. S. 212, Mr. Chief Justice Taft, speaking for the Court said, at page 217:

> An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law. *Merritt* v. *United States,* 267 U. S. 338, 340, 341; *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581.

In *Sutton* v. *United States*, 256 U. S. 575, the rule was stated as follows, at page 581:

> For the right to sue the United States in the Court of Claims here invoked must rest upon the existence of a contract express or implied in fact. *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 335.

And in *Merritt* v. *United States,* 267 U. S. 338, this Court said, at page 341:

> The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581. * * *

No agreement of the parties is alleged in the petition nor are facts alleged from which any such agreement can be inferred as a fact. Prior to

June 30, 1923, the officials of the Veterans' Bureau informed the claimant company that the United States would give up occupancy of the demised premises as of June 30, 1923. (R. 9–10.)

> It was contended by the representatives of the Veterans' Bureau that the lease in question did not extend beyond June 30, 1923, on the theory that there had been no authority in the Director of the Veterans' Bureau to make a lease for more than one fiscal year. Representatives of the claimant contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not been the case. When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over.

We are not called upon to decide what, if any, contract might have been implied in fact if with-

out saying anything about it the Veterans' Bureau had merely held over after June 30th; or if prior to June 30th the landlord had notified the officials of the Bureau that they must vacate on June 30th, unless they wished to renew for another year, and without doing or saying anything further they had continued their occupancy. No such facts are alleged in the petition. It was distinctly stated by the Government officials that the United States would give up occupancy of the premises, and thereafter that they desired to occupy the premises beyond that date but had no intention of paying rent for any longer time than the actual period of occupancy. These facts are distinctly alleged, and they show affirmatively that there was no agreement to the contrary. Beyond this, the allegation is merely of a discussion of propositions of law upon which there was a difference of opinion.

But, as stated by Mr. Justice Brandeis in his dissenting opinion in *Portsmouth Co.* v. *United States,* 260 U. S. 327, at page 332:

> Implied contracts in fact do not arise from denials and contentions of parties, but from their common understanding whereby mutual intent to contract without formal words therefor is shown. *Farnham* v. *United States,* 240 U. S. 537; *E. W. Bliss Co.* v. *United States,* 253 U. S. 187, 190, 191; *Knapp* v. *United States,* 46 Ct. Clms. 601, 643.

See also *Newmarket Manufacturing Company* v. *Coon,* 150 Mass. 566.

II

THE LIABILITY IMPOSED BY LAW UPON A TENANT HOLDING OVER DOES NOT RESULT FROM A CONTRACT IMPLIED IN FACT

The question remaining is whether the obligation imposed on a tenant holding over by the technical rule of the law of landlord and tenant results from a contract implied in fact. It is plain that it does not.

A contract implied in fact is a true contract, an agreement of the parties being inferred from the circumstances, while a contract implied in law is a duty imposed by law and treated as a contract for the purposes of a remedy only. *Harley* v. *United States,* 198 U. S. 229; *The Columbus, Hocking Valley & Toledo Railway Co.* v. *Gaffney,* 65 Ohio St. 104.

In the latter case the Court said, 65 Ohio St., at page 113:

> There is some confusion in the statement of the law applicable to what are frequently called implied contracts, arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but because where the procedure of the common law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists or can in reason be supposed to exist—the favorite remedy of implied assumpsit could be adopted. * * * But contracts that are true contracts are

> frequently termed implied contracts, as, where from the facts and circumstances, a court or jury may fairly infer, as a matter of fact, that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are, or can be, indulged. The evidence must satisfy the court and jury, that the parties understood that each sustained to the other a contractual relation; and that by reason of this relation the defendant is indebted to the plaintiff for services performed or for goods sold and delivered.

Contracts implied in law are a class of obligations imposed or created by law without regard to the assent of the party bound. *Steamship Company* v. *Joliffe,* 2 Wall. 450. See also 13 *Corpus Juris,* 240.

The liability of a hold-over tenant belongs to this class.

In *Tiffany, Landlord and Tenant,* Vol. 2, p. 1472, it is stated:

> It has been suggested that this option in the landlord is to be regarded as based on the

> theory that the tenant holding over presumably intends to hold for another term or period, and that he can not overthrow this presumption by asserting, to the disadvantage of the landlord, that he is holding as a wrongdoer. There seems, however, no advantage in introducing such a theory, and it is more satisfactory to regard this as "one among the cases where a person may be charged, as upon a contract, without his consent, and contrary to his intention." In other words, the tenant is liable for further rent upon the principle, not of contract, but of *quasi* contract. That this is the character of the liability plainly appears from the fact that it exists in spite of any statements by the tenant evidencing a contrary intention.

See also *Clinton Wire Cloth Co.* v. *Gardner,* 99 Ill. 151.

In *Herter* v. *Mullen,* 159 N. Y. 28, it was said, at page 42:

> The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

In *U. M. Realty & Imp. Co.* v. *Roth*, 193 N. Y. 570, 576, the court, by Chief Judge Cullen, said that—

> the right of the landlord to treat the holdover as a tenant for a new term does not spring from the contract of the parties but is the penalty imposed by law upon the trespassing tenant.

Of course the United States is not liable for penalties imposed for tortious acts.

According to all the authorities the landlord has an option either to treat the tenant holding over as a trespasser or, waiving the tort, to hold him liable for another year, but no right of action against the United States in contract can be created by waiving a tort. *Bigby* v. *United States*, 188 U. S. 400, 409.

It is, of course, true that when a contract has in fact been made between the United States and one of its citizens, the interpretation of the contract is governed by the same rules as govern contracts between other parties. For instance, in every lease there is, unless excluded by some express covenant, an implied obligation on the part of the lessee so to use the property as not unnecessarily to injure it, and this implied obligation is part of the contract as much as if incorporated by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *United States* v. *Bostwick*, 94 U. S. 53. But first, however, the existence of the contract must be found

as a fact. That was what was done in the *Bostwick case*. Having determined that a contract had been made, equivalent for the purposes of the action to a lease duly executed, this Court said, at page 66:

> Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record.

In each of the cases in the Court of Claims, cited in appellant's brief (*McCollum* v. *United States*, 17 C. Cls. 92; *Connecticut Mutual Life Insurance Co.* v. *United States*, 21 C. Cls. 195; *Smoot* v. *United States*, 38 C. Cls. 418), the facts found showed an existing contract and the questions were as to the incidents arising therefrom. Thus, in the *Connecticut Mutual Life Insurance Company case*, the effect of a fire occurring in the demised premises upon the tenant's liability for rent was involved, and in the *Smoot case* the premises were abandoned by the tenant before the expiration of an existing term.

Such is not the present case, however, and the error of the petitioner's argument consists in begging the question by first assuming the existence of a contract implied in fact and then drawing implications which might be warranted if the contract existed. The lease terminated on June 30, 1923, and would not be binding for another year, unless the authorized officers of the Government affirmatively exercised their option to renew. *Leiter* v. *United States*, 271 U. S. 204. Had they, with-

out saying more, continued to occupy the premises and pay the same rent, it might have been found as a fact that they intended to exercise that option (*McCollum* v. *United States, supra; Smoot* v. *United States, supra*), but that is not what happened. They refused definitely to exercise the option, and in the face of that definite refusal no liability for another year could arise except upon the theory of a *quasi* contract, or upon the theory of a penalty imposed for a tort.

III

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

JANUARY, 1928.

○

SUPREME COURT OF THE UNITED STATES.

No. 159.—October Term, 1927.

The Goodyear Tire & Rubber Company, Inc., Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[March 12, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

The Goodyear Company brought this action under the Tucker Act,[1] to recover rent claimed under a lease to the United States. The petition was dismissed, on demurrer, for failure to state a cause of action. 62 Ct. Cls. 370.

The facts alleged were these: In October, 1921, the predecessor of the Goodyear Company leased to the United States, for the use of the Veterans' Bureau, certain premises in Cincinnati, Ohio, for a term ending June 30, 1926, at a stipulated annual rental payable in monthly instalments. No appropriation was then available for payment of the rent after the first fiscal year, ending June 30, 1922;[2] and the lease provided that if an appropriation was not made under which the rent for any succeeding fiscal year might be paid, it should automatically terminate as of June 30 of the year for which an appropriation was last available.

The lessor assigned and transferred the lease to the Goodyear Company in January, 1922. In June an appropriation was made, available for the fiscal year ending June 30, 1923; and the lease was by agreement "renewed" for that year. In February, 1923, an appropriation was made, available for the fiscal year ending June 30, 1924. Before June 30, 1923, the officials of the Veterans' Bureau informed the Company that the United States would give up the occupancy of the premises as of that date. "When June 30, 1923, ar-

[1] 24 Stat. 505, c. 359; Jud. Code, § 145, U. S. C., Tit. 28, § 250.

[2] The fiscal years begin on July 1st of each year and terminate on June 30th of the next year.

rived"—as the petition alleged—"the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that . . . even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over." The United States continued in possession to December 20, 1923, when it vacated the premises. The rent was paid to December 31, 1923.

The Company claimed that "by reason of holding over" the United States was bound for the entire fiscal year ending June 30, 1924, and liable for the unpaid rental to that date.[3]

In *Leiter* v. *United States*, 271 U. S. 204, 207, we held that a lease to the United States for a term of years, made without any specific authority of law and entered into when there was no appropriation available for the payment of rent after the first fiscal year, in so far as its terms extend beyond that year, violates the express provisions of Sections 3732 and 3679 of the Revised Statutes[4] and creates no binding obligation on the Government after that year; and that "to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly

[3]This claim had been rejected by the Comptroller General. 5 Dec. Comp. 172. An alternative claim presented by the petition that the United States was bound by the original lease for the full term to June 30, 1926, was abandoned before the hearing.

[4]Sec. 3732 provides that "No contract . . on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. . " Sec. 3679, as amended in 1906, provides that "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year."

The Company contends "that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act."

We cannot sustain this contention. In order to bind the Government for the fiscal year ending June 30, 1924, it was necessary, as held in the *Leiter* case, that after the available appropriation had been made, the Government should affirmatively continue the lease for that year, that is, in effect, make a new lease for the year under the authority of such appropriation. This it did not do, either expressly or impliedly. On the contrary, the notice given by the officials of the Veterans' Bureau to the Company, before holding over, that the Government did not intend to pay rent beyond the actual period of occupancy, negatived any intention to continue the lease for the entire year, and left no basis for inferring an agreement to continue it after the Bureau should cease to occupy the premises. It is immaterial that under the common law in Ohio as applied between private parties, a lessee holding over after the expiration of his lease is held, at the option of the lessor, to be bound for another year, under an agreement implied in law, regardless of his actual intention, *Railroad Co.* v. *West,* 59 Ohio St. 161, 165, 168, *Bumiller* v. *Walker,* 95 Ohio St. 344, 349. Not having affirmatively continued the lease beyond the actual period of occupancy, the Government cannot, under the doctrine of the *Leiter* case, be bound for a longer term.

Furthermore, independently of that doctrine, the right here invoked to sue the United States under the Tucker Act on a claim founded on contract—as this is—must rest upon the existence of a contract express or implied in fact, no right of action being given by the Act in cases where, if the transaction were between

private parties, recovery could be had upon a contract implied in law. *Sutton* v. *United States,* 256 U. S. 575, 581; *Merritt* v. *United States,* 267 U. S. 338, 341; *United States* v. *Minn. Investment Co.,* 271 U. S. 212, 217. And see *Balt. & Ohio R. R.* v. *United States,* 261 U. S. 592, 597.

The judgment is

Affirmed.

Mr. Justice HOLMES.

There was no adverse holding in this case. The United States admitted that it occupied the premises under a contract as lessee until June 30, 1923. One consequence of this contract by the law that governed it and by the stipulation of the lessor was that if the lessee held over he held over for a year. I do not see how the United States could accept the contract and repudiate the consequence, or accept the permission of the lessor to continue in possession upon the express condition that it be bound for a year and repudiate the condition, except in the event of there being no appropriation in which case the paramount law of the United States would prevail. There was an appropriation here and therefore there was nothing to hinder the United States being bound until June 30, 1924, except the statement of the agents that it did not mean to be, which seems to me merely the statement that it did not mean to accept the legal consequence of its act.

Mr. Justice SUTHERLAND and Mr. Justice STONE concur in this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.